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IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. M-274.

UNITED STATES EX REL. THOMAS W. CUNNINGHAM	B. M. Golder, Otto Kraus, Jr.
v.	
WALTER C. FETTERS, UNITED STATES MARSHAL.	Howard Benton Lewis.

DOCKET ENTRIES.

Dec. 23, 1930. Petition for and Order granting writ of Habeas Corpus filed.

Dec. 23, 1930. Writ of Habeas Corpus returned: "I have the body here in Court" and filed.

Dec. 23, 1930. Return to Writ of Habeas Corpus filed.

Dec. 23, 1930. Traverse to return to Writ of Habeas Corpus filed.

Dec. 23, 1930. Stipulation of counsel as to hearing in these proceedings filed.

Dec. 23, 1930. Argued.

Dec. 23, 1930. Opinion, Dickinson J., granting leave to enter an order discharging the relator without day, filed.

Dec. 23, 1930. Order of Court discharging relator without day upon entry of his own recognizance in $1000. filed.

Dec. 23, 1930.	Recognizance of Relator in $1000. filed.
Dec. 23, 1930.	Assignments of Error filed.
Dec. 23, 1930.	Petition for appeal filed.
Dec. 23, 1930.	Order of Court allowing petition for appeal filed.
Dec. 26, 1930.	Citation allowed and issued.
Dec. 26, 1930.	Copy of notice of appeal filed.
Dec. 26, 1930.	Testimony filed.
Dec. 29, 1930.	Citation returned; "service accepted" and filed.
Dec. 30, 1930.	Præcipe for transcript of record sur appeal filed.

PETITION FOR WRIT OF HABEAS CORPUS.

(Filed December 23, 1930.)

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

M-274.

United States of America ex rel. Thomas W. Cunningham

v.

Walter C. Fetters, United States Marshal.

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

1. Your petitioner, Thomas W. Cunningham, respectfully represents to your Honorable Court that he is a citizen of the United States and a resident of the City and County of Philadelphia, State of Pennsylvania, within this judicial district.

2. Your petitioner further represents that he is now actually, unjustly and unlawfully imprisoned and restrained of his liberty and detained by Walter C. Fetters, United States Marshal, by virtue of a warrant issued by Honorable O. B. Dickinson, United States District Judge, Eastern District of Pennsylvania, the said warrant of arrest having been issued the twenty-sixth day of April, 1928. A copy of said warrant is attached hereto and marked Exhibit "A."

3. That in the affidavit for the warrant of arrest, it is alleged on behalf of the United States Government, through S. Busha, agent of Department of Justice,

"upon his knowledge, information and belief, that on February 21, 1927, at Washington, in the District of Columbia, Thomas W. Cunningham, did knowingly, wilfully and unlawfully fail, neglect and refuse to answer certain questions propounded to him during his attendance before a committee of the Senate of the United States as a witness who had been summoned to give testimony upon a matter then under inquiry before said committee, said questions being pertinent to the matter then under inquiry before said committee.

"In violation of Section 102 of the Revised Statutes of the United States, and against the peace and dignity of the said United States.

"This deponent bases his knowledge, information and belief upon an indictment found by a Grand Jury of the United States of America in and for the District of Columbia, a duly certified copy of said indictment being thereto attached and made part hereof.

(Signed) S. BUSHA."

A copy of said affidavit is hereto attached and marked Exhibit "B."

4. That your petitioner has never been guilty of any crime against the United States of America and in particular of any violation of Revised Statutes No. 102 of the United States of America, in that he has at no time failed, neglected or refused to answer any questions pertinent to any inquiry made by either House of Congress or by a committee of either House of Congress, concerning a matter over which each House had jurisdiction to investigate.

5. Your petitioner further represents that the indictment failed to disclose *inter alia* that the questions therein set forth at large, which your relator refused to answer, were pertinent questions in the inquiry then being made by the particular committee of the United

States Senate therein described; that the said indictment shows conclusively that none of the questions and answers set forth in said indictment had anything to do with the general election of William S. Vare, a candidate for United States Senate; that said indictment failed to allege and disclose that the inquiry which said committee was then making was one over which by the Constitution of the United States they had jurisdiction and authority. A copy of said indictment is hereto attached and marked Exhibit "C."

WHEREFORE your petitioner prays your Honorable Court that a writ of habeas corpus may issue, directed to the said Walter C. Fetters, United States Marshal aforesaid, and to each and all of his deputies, requiring him and them to bring and have your petitioner, together with a true cause of the detention of your petitioner, before this Court at the time by this Court determined to the end that due inquiry may be had in the premises and that the Court may proceed to determine the facts of this case in that regard and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of this petitioner as law and justice may require.

And your petitioner will ever pray, etc.

(Sgd.) THOMAS W. CUNNINGHAM.

IN THE DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

THOMAS W. CUNNINGHAM, being duly sworn according to law, deposes and says that he is the petitioner in the foregoing petition, and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

(Sgd.) THOMAS W. CUNNINGHAM.

Sworn to and subscribed before me this twenty-third day of December, A. D. 1930.

(Sgd.) GEORGE BRODBECK,
Clerk, U. S. District Court,
Eastern District of Pennsylvania.

EXHIBIT "A."

WARRANT.

To the President of the United States of America.

To the United States Marshal for the Eastern District of Pennsylvania:

Whereas, the above affidavit has been made in writing before me, a United States District Judge for the Eastern District of Pennsylvania, that on February 21, 1927, at Washington, in the District of Columbia, Thomas W. Cunningham, hereinafter called the defendant, did, knowingly, willfully and unlawfully, violate the statutes of the United States in manner and form as above set forth.

Now, Therefore, You are hereby commanded to apprehend the said defendant, and bring the body forthwith before me to answer according to law.

Given under my hand and seal at Philadelphia, this twenty-sixth day of April, 1928.

(Signed) O. B. Dickinson,
United States District Judge,
Eastern District of Pennsylvania.

EXHIBIT "B."

HBL

COURT OF UNITED STATES COMMISSIONER
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	No.	C. R. 113-1928.
v.	Section	
THOMAS W. CUNNINGHAM	Penal Code	

AFFIDAVIT FOR WARRANT OF ARREST

S. Busha, being duly sworn according to law, deposes and says upon knowledge, information, and belief, that on February 21, 1927, at Washington, in the District of Columbia Thomas W. Cunningham did knowingly, willfully, and unlawfully fail, neglect and refuse to answer certain questions propounded to him during his attendance before a committee of the Senate of the United States as a witness who had been summoned to give testimony upon a matter then under inquiry before said committee, said questions being pertinent to the matter then under inquiry before said committee.

In violation of Section 102 of the Revised Statutes of the United States, and against the peace and dignity of the said United States.

This deponent bases his knowledge, information and belief upon an indictment found by a Grand Jury of the United States of America in and for the District of Columbia, a duly certified copy of said indictment being hereto attached and made part hereof.

(Signed) S. BUSHA

Sworn to and subscribed before me at Philadelphia, this 26th day of April, 1928.

(Signed) O. B. DICKINSON
United States District Judge
Eastern District of Pennsylvania.

EXHIBIT "C."

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

To all to whom these presents come, Greeting:

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA, } *ss.:*

Be It Remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the time hereinafter mentioned, among others, was the following proceeding, to wit:

Filed in Open Court Apr. 20, 1928,

Frank E. Cunningham,
Clerk.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.
Holding a Criminal Term.

April Term, A. D. 1928.

District of Columbia, ss:

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That for a considerable period of time prior to the date of the finding of this indictment, the Senate of the United States has been greatly concerned and

disturbed, in connection with the nomination and election of candidates for the office of member of the said Senate of the United States, by the bringing to the attention of the said Senate of the United States of certain allegations and charges of fraudulent, and corrupt, and unlawful practices in connection with such nomination and election of candidates in several States for the said office; and that consequently the said Senate of the United States has been keenly interested in the matter of securing information and data to permit the ascertainment and determination of the truth or falsity of such allegations and charges, as aforesaid, and to enable the said Senate of the United States to ascertain and determine what, if any, other or additional legislation might be advisable upon the general subject of the nomination and election of candidates for the office of member of the said Senate of the United States; and that as a consequence of the making of such allegations and charges, and for the purposes and under the circumstances aforesaid, the Senate of the United States, on May 19, 1926, did adopt a certain resolution (S. Res. 195), that is to say, a resolution of the tenor following:

RESOLVED, that a special committee of five, consisting of three members selected from the majority political party, of whom one shall be a progressive republican, and of two members from the minority political party, shall be forthwith appointed by the President of the Senate; and said committee is hereby authorized and instructed immediately to investigate what moneys, emoluments, rewards, or things of value, including agreements of understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization,

or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto.

Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary; to require subpœna or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee wilfully makes default, or who, having appeared, refused to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by Section 102 of the Revised Statutes of the United States.

Said committee shall promptly report to the Senate the facts by it ascertained.

And that on June 3, 1926, the Senate of the United States did adopt a certain other resolution (S. Res. 227), that is to say, a resolution of the tenor following:

RESOLVED, That the special Senate Committee created pursuant to Resolution 195, agreed to the 19th day of May, 1926, hereby is authorized to employ stenographic assistance, at a cost not exceeding 25 cents per hundred words, to report such hearings and proceedings as may be had in connection with any subject which may be before said committee and such clerical or other assistance as may be deemed necessary by the committee, that all expenses incurred, including costs of travel by the committee or their assistants, in furtherance of the purposes of said resolution, shall be paid out of the contingent fund of the Senate upon vouchers properly approved. The costs of this investigation shall not exceed $10,000.

And that on June 30, 1926, the Senate of the United States did adopt a certain other resolution (S. Res. 258); that is to say, a resolution of the tenor following:

RESOLVED, That the limit of expenditure to be made under authority of Senate Resolution Numbered 227, agreed to June 3, 1926, be, and the same hereby is, increased from $10,000 to $50,000.

And that on January 11, 1927, the Senate of the United States did adopt a certain other resolution (S. Res. 324) that is to say, a resolution of the tenor following:

Whereas William B. Wilson, of the State of Pennsylvania, has presented his petition to the Senate of the United States contesting the election of William S. Vare as a Senator from Pennsylvania in the election held on the 2nd day of November, 1926; and

Whereas the said William B. Wilson charges in his petition fraudulent and unlawful practices in connection with the nomination and in connection with

the alleged election of the said Vare as Senator of the State of Pennsylvania, and that unless preserved for the use of the Senate evidence relating to said charges and said election will be lost or destroyed; and

Whereas the special committee of five organized under Senate Resolution Number 195, Sixty-ninth Congress, first session, by direction of the Senate has entered upon an investigation pertaining to alleged corrupt practices in the election held November 2, 1926, and in the primary proceeding it is the State of Pennsylvania; Therefore be it

RESOLVED, That the special committee of five constituted under Senate Resolution Number 195, Sixty-ninth Congress, first session, in addition to, and not in detraction from the powers conferred in said resolution, be, and it is hereby, authorized and empowered:

(1) To take possession, in the presence of the said William S. Vare or his representative if the said William S. Vare desires to be present or to have a representative present, and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books and documents used in said senatorial election held in the State of Pennsylvania on the 2nd day of November, 1926.

(2) To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters or other acts or facts affecting the result of said election.

(3) That said committee is hereby vested with all powers of procedure with respect to the subject matter

of this resolution that said committee possesses under Resolution Numbered 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

(4) That the Sergeant at Arms of the Senate and his deputies are directed to attend the said special committee and to execute its directions. That the said special committee may appoint sub-committees of one or more members with power and authority to act for the full committee in taking possession of evidence and in the subpœnaing of witnesses and taking testimony.

RESOLVED FURTHER, That the expenses incurred in carrying out this resolution shall be paid from the contingent fund of the Senate upon vouchers ordered by the Committee or any sub-committee thereof and approved by the chairman of the committee, the cost of same not to exceed $15,000 in addition to the moneys heretofore authorized to be expended.

WHEREUPON, and by force and under authority of the aforesaid resolutions, the said special committee of five organized under Senate Resolution Number 195, Sixty-ninth Congress, first session, which said committee is hereafter referred to in this indictment as 'the said committee,' was empowered and directed to investigate the entire subject of the alleged fraudulent and corrupt and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, with particular reference to the ascertainment and determination of facts in connection with the alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters, or

other acts or facts affecting the result of said election, and to report its findings and recommendations to the Senate with a view to enabling the Senate to ascertain and determine what, if any, other or additional legislation might be advisable in the premises; that the said committee did in fact thereupon proceed to exercise that authority and to make such investigation, for the purpose of making such report, findings and recommendations to the Senate, with a view of enabling the Senate to ascertain and determine what, if any, other or additional legislation might be advisable, and the matters so referred to the said committee then and there, to wit, at Washington in said District of Columbia, therefore came under inquiry before the said committee and the said committee, for that purpose and in that behalf, did hold sundry hearings at which witnesses were examined and documents produced.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That thereafter, to wit, on the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, said matters and questions then and there still being matters and questions under inquiry before the said committee and Senate, it became and was a material matter and question before the said committee to ascertain and determine the amount and the source of all moneys and other things of value contributed and donated by one Thomas W. Cunningham, for expenditure and for other use in connection with the nomination and in connection with the alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania; and that the said Thomas W. Cunningham, on the said Twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, hav-

ing been theretofore, to wit, on the fifteenth day of February, in the year of our Lord one thousand nine hundred and twenty-seven, duly served with a subpœna issued by direction of said committee by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, on said twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, did appear before the said committee as such witness in obedience to such subpœna, and was then and there duly sworn; that thereupon the Honorable James A. Reed, a member and the chairman of the said committee, for said committee, propounded to the said Thomas W. Cunningham, a certain question which, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then and there under inquiry before the said committee as aforesaid; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: Mr. Cunningham, the committee has called you before it the second time in order to permit you an opportunity to answer the questions you declined to answer before, and afford you the opportunity to answer such other questions as may be put to you. Mr. Cunningham, on your previous examination you stated (reading):

I handed money to Thomas F. Watson $25,000 on the 10th day of April, 1926.

Then this follows, as shown by the record of the proceedings (reading):

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

The Chairman: Your own private moneys?

Mr. Cunningham: Yes, sir; my own money; my own money.

The Chairman: How long had it been your own money?

Mr. Golder at that time stated an objection, which appears in the record.

The question was repeated as follows (reading):

The Chairman: How long had it been your own money?

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business,"

the said Honorable James A. Reed then and there said to said Thomas W. Cunningham,

"I now ask you the same question again, Mr. Cunningham", the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him the said Thomas W. Cunningham, an answer at that time and place

to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States for the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said

Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT:

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That, to wit, on the said twenty-first day of February in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this count by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth, in said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said first count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, and having appeared before the said committee as such witness, in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James A. Reed, a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then under inquiry before the said committee, as in the said

first count set forth; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: Very well, the next question which was asked you was as follows (continuing reading):

The Chairman: Where did you get this $25,000 you say you gave Mr. Watson?

Mr. Cunningham: I refuse to answer that question, I think that is personal."

The said Honorable James A. Reed then and there said to the said Thomas W. Cunningham:

"I now ask you, on behalf of the committee, the same question, and await your answer."

The said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against

the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT:

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That, to wit, on the said twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this court by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth in, said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said first count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, and having appeared before the said committee, as such witness in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James A. Reed, a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question of pertinence to said matters and questions then under inquiry before the said committee, as in the said first count set forth: that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: The next question that was asked you as follows (continuing reading):

The Chairman: Where were you keeping the $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it."

the said Honorable James A. Reed then and there said to the said Thomas W. Cunningham,

"'I now ask you the same question, that is, where were you keeping this $25,000 before you gave it to Mr. Watson?'"

the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and con-

trary to the form of the statute of the same in such case made and provided.

FOURTH COUNT:

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That, to wit, on the said Twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this count by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth, in said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said fourth count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, and having appeared before the said committee as such witness, in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James A. Reed, a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then under inquiry before the said committee, as in the said first count set forth; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: Very well, you were asked a number of questions, which I will read for the context (continuing reading):

The Chairman: Did you give this money to Mr. Watson in cash or by check.

Mr. Cunningham: I gave it to him as cash.

The Chairman: Where were you when you gave it to him?

Mr. Cunningham: I took it down to his headquarters at the Walton Hotel on the 10th day of April.

The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

The Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it."

The said Honorable James A. Reed then and there said to the said Thomas W. Cunningham,

"I now ask you again, where did you get it? That is, where did you get this money from to put in your pocket?"

the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him, the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, and with

particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FIFTH COUNT:

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That, to wit, on the said twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this count by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth, in said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said first count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, and having appeared before the said committee as such witness, in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said

Thomas W. Cunningham, by the said Honorable James A. Reed a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then under inquiry before the said committee, as in the said first count set forth; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: Very well. The next question asked you was (continuing reading):

The Chairman: Mr. Cunningham, how long had you had this money in your possession?

Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it."

the said Honorable James A. Reed then and there said to the said Thomas W. Cunningham,

"I now ask you, how long had you had this money in your possession?"

the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him, the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare, as a member of the Senate of the United States from the State of Pennsylvania, and with particular reference to the ascertainment and determi-

nation of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SIXTH COUNT:

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That, to wit, on the said twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this count by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth, in the said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said first count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said Committee, and to give testimony before the said committee, and having appeared before the said committee as such witness, in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James

A. Reed, a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then under inquiry before the said committee, as in the said first count set forth; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: You were then asked questions touching your salary, and after that, this question (reading):

The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: That is another personal question. I cannot answer that."

the said Honorable James A. Reed then and there said to the said Thomas W. Cunningham,

"I now ask you again, with this $25,000 which you refer to as the $25,000 that you gave to Watson, savings from your salary?"

the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him, the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, and with

particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Leo A. Rover,
Attorney of the United States in
and for the District of Columbia.

Orig.

Criminal No. 46931.
United States
vs.
Thomas W. Cunningham

Violation of Section 102 of the Revised Statutes.

Witnesses:
James F. Sellers
Hicklin Yeates

Filed in Open Court
Apr. 20, 1928,
Frank E. Cunningham, Clerk

A True Bill:
Martin R. West
Foreman.

AUTHENTICATION.

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Frank E. Cunningham, Clerk of the said Court, do hereby certify that the copy of indictment, annexed to this certificate, is a true copy of the original on file and of record in said offices, and that said original indictment is pending in said Court.

Witness my hand and the seal of said Court, this 28th day of April, 1928.

Frank E. Cunningham, Clerk.

I, F. L. Siddon, Presiding Justice of said court, do certify the foregoing attestation by Frank E. Cunningham, Clerk of the said court, to be in due form.

Witness my hand and seal this 28th day of April, 1928.

(Signed) F. L. Siddon,
Presiding Justice.

I, Frank E. Cunningham, Clerk of the said court, hereby certify that the Honorable F. L. Siddons, whose genuine signature is snbscribed to the foregoing certificate, was, at the time of signing and attesting the same Presiding Justice of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court, this 28th day of April, 1928.

(Signed)
Frank E. Cunningham, Clerk.

"Copy of Indictment from
The Supreme Court of the District of Columbia.

Criminal No. 46931

United States

vs.

Thomas W. Cunningham."

ORDER ALLOWING WRIT OF HABEAS CORPUS.

Writ allowed, returnable forthwith and hearing fixed December 23, 1930.

(Sgd.) O. B. Dickinson,
Judge.

WRIT OF HABEAS CORPUS.

(Issued December 23, 1930.)

UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.:*

THE PRESIDENT OF THE UNITED STATES,

To Walter C. Fetters, United States Marshal,

GREETING:

We command you, that the body of THOMAS W. CUNNINGHAM, who is under your custody, as it is said, detained by whatsoever names the said THOMAS W. CUNNINGHAM may be detained, together with the day and cause of being taken and detained, you have before the HONORABLE OLIVER B. DICKINSON, Judge of the District Court of the United States in and for the Eastern District of Pennsylvania, at the Room of the District Court of the United States, in the City of Philadelphia, immediately, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then there this writ.

WITNESS the Honorable the Judges of said Court at Philadelphia, this twenty-third day of December, A. D. 1930, and in the one hundred and fifty-fifth year of the Independence of the said United States.

GEORGE BRODBECK,
Clerk U. S. District Court,
Eastern District of Pennsylvania.

By (Sgd.) E. G. JOHNSON,
Deputy Clerk.

Service of the within writ accepted and acknowledged this twenty-third day of December, 1930.

(Sgd.) WALTER C. FETTERS,
United States Marshal,
By (Sgd.) CHAS. P. MALLON,
Deputy Marshal.

RETURN ENDORSED ON WRIT.
(Filed December 24, 1930.)

As commanded by the within writ of habeas corpus, I have this twenty-third day of December, A. D. 1930, the body of the relator, THOMAS W. CUNNINGHAM, here in court and hold him pending decision of the Court.

So answers

WALTER C. FETTERS,
United States Marshal,
Per (Sgd.) CHARLES P. MALLON,
Deputy.

RETURN TO WRIT OF HABEAS CORPUS.
(Filed December 23, 1930.)

Walter C. Fetters, being duly sworn, deposes and says that he is the Marshal of the United States for the Eastern District of Pennsylvania, and on his oath makes this return to the writ of habeas corpus issued herein on the twenty-third day of December, 1930, producing in court the body of Thomas W. Cunningham mentioned in the said writ, and for a further return to said writ deposes as follows:

1. Deponent admits the allegations of paragraph "1" of the petition of said Cunningham.

2. Deponent admits that said Cunningham is actually restrained of his liberty and detained by him, but denies that the restraint and detention are unjust and unlawful. On the twenty-third day of December, 1930, immediately prior to the service of the writ of habeas corpus upon him, deponent had taken custody of said Thomas W. Cunningham by virtue of a warrant of removal and the other proceedings hereinafter referred to and was about to execute said warrant of removal by removing said Thomas W. Cunningham to the District of Columbia in order there to deliver him to the Marshal of the said District of Columbia pursuant to said warrant of removal. A copy of said warrant of removal is annexed hereto, marked Exhibit "A," and is hereby made a part hereof. The said warrant of removal was issued as a result of certain proceedings before the Honorable Oliver B. Dickinson, a correct record of which proceedings, with certain proceedings subsequent thereto, all consisting of sixty-eight pages, is annexed hereto, marked Exhibit "B," and is hereby made a part hereof. The said Thomas W. Cunningham on May 10, 1928, filed in the District Court of the United States for the Eastern District of Pennsylvania a petition for a writ of habeas corpus to obtain his discharge from custody of W. Frank Mathues, then United States Marshal for the Eastern District of Pennsylvania. Said District Court entered a decree dismissing said petition, but the Circuit Court of Appeals for the Third Circuit reversed this decree and remanded the cause to the District Court with instructions to discharge said Thomas W. Cunningham. The Supreme Court of the United States granted a writ of certiorari to the Circuit Court of Appeals for the Third Circuit in this matter and thereafter vacated said judgments of

the United States Circuit Court of Appeals for the Third Circuit and of the United States District Court for the Eastern District of Pennsylvania and remanded the cause to said District Court with directions to dismiss the proceeding for writ of habeas corpus against said W. Frank Mathues, as abated. Said District Court has dismissed said proceeding against W. Frank Mathues for writ of habeas corpus, as abated.

3. Deponent admits the allegations contained in paragraph of said petition marked "3," but for greater certainty refers to the copy of the affidavit which appears in Exhibit "B," annexed hereto.

4. Upon information and belief deponent denies the allegations of the paragraph of said petition marked "4," and refers to the copy of the indictment which appears in Exhibit "B" annexed hereto.

5. Upon information and belief deponent denies the allegations of the paragraph of said petition marked "5," and refers to the copy of said indictment which appears in Exhibit "B" annexed hereto.

The sources of your deponent's information and the grounds of his belief as to the facts hereinbefore alleged are the warrant, marked Exhibit "A," annexed hereto, and the proceedings, marked Exhibit "B," annexed hereto.

WHEREFORE, deponent prays that the writ of habeas corpus herein may be dismissed and that the said Thomas W. Cunningham be remanded to the custody of the respondent to be dealt with according to law.

(Sgd.) WALTER C. FETTERS,
United States Marshal,
Eastern District of Pennsylvania.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

Walter C. Fetters, being duly sworn according to law, deposes and says that he is the United States Marshal for the Eastern District of Pennsylvania; that he makes the foregoing return to the writ of habeas corpus in the above-entitled case; and that the facts set forth in the said return are true to the best of his information, knowledge and belief.

(Sgd.) WALTER C. FETTERS.

Sworn to and subscribed before me this twenty-third day of December, 1930.

(Sgd.) THEODORE L. COBAUGH,
Deputy Clerk, U. S. D. C.,
Eastern District of Pennsylvania.

EXHIBIT "A."

THE UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA } Sct. 113 of 1928.

THE PRESIDENT OF THE UNITED STATES OF AMERICA
To the Marshal of the Eastern District of Pennsylvania,

GREETINGS:

WHEREAS Thomas W. Cunningham has been brought before me upon a commitment made by me, a District Judge sitting as a Committing Magistrate for the purpose of obtaining a warrant for the removal of the said THOMAS W. CUNNINGHAM to the District of Columbia in which District the offense for which said prisoner has been so committed is to be tried, the copy of which commitment returned by the United States

Marshal, as also all other proceedings, are hereto annexed:

And Whereas the United States District Attorney for the Eastern District of Pennsylvania has made application to me, under the provisions of the statutes of the United States in the behalf provided, for a warrant for the removal of the said prisoner to the said District of Columbia and an examination into the matter having been made by me:

Now, Therefore, You Are Hereby Commanded, in the name of the President of the United States of America, to remove the said prisoner now in your custody forthwith to the said District of Columbia and there deliver him to the Marshal of the said District of Columbia or some other proper officer authorized to receive the said prisoner, in order that he may be dealt with according to law, and make return what you shall have done, together with this writ, to the Clerk of the Supreme Court of the District of Columbia.

Given under my hand and the seal of the District Court of the United States for the Eastern District of Pennsylvania, at the
(Seal) city of Philadelphia, this 10th day of May, A. D. 1928, and in the One Hundred and Fifty-Second year of the Independence of the United States.

(Sgd.) Oliver B. Dickinson
Judge of the District Court.

Attest:

(Sgd.) George Brodbeck
Clerk District Court.

EXHIBIT "B."

TRANSCRIPT OF RECORD.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 3857. October Term, 1928.

UNITED STATES OF AMERICA EX REL.
THOMAS W. CUNNINGHAM,
Appellant,

vs.

W. FRANK MATHUES, United States
Marshal,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. M-140.

UNITED STATES ex rel. THOMAS W. CUNNINGHAM	Golder; Felger & Lemisch
vs.	
W. FRANK MATHUES, U. S. MARSHAL, E. D. of Pa.	George W. Coles

DOCKET ENTRIES.

May	10, 1928.	Petition for Writ of Habeas Corpus filed.
"	10, "	Order of Court dismissing Petition for Writ of Habeas Corpus filed.
"	10, "	Order of Court enlarging Relator on bail in $1000.00 filed.
"	10, "	Petition for Appeal with supersedeas and Order of Court granting prayer of petition filed.
"	10, "	Assignments of Error filed.
"	10, "	Bond of Relator with surety in $1,000. filed.
"	10, "	Citation allowed and issued.
"	10, "	Citation returned: "service accepted" and filed.
"	14, "	Copy of Notice of Appeal filed.
"	17, "	Testimony filed.
"	17, "	Præcipe as to transcript of record sur appeal filed.

COURT OF UNITED STATES COMMISSIONER,
EASTERN DISTRICT OF PENNSYLVANIA.

Commissioners' Return No. 113 of 1928.
Section.
Penal Code.

UNITED STATES OF AMERICA

vs.

THOMAS W. CUNNINGHAM.

AFFIDAVIT FOR WARRANT OF ARREST.

S. Busha, being duly sworn according to law, deposes and says upon knowledge, information, and belief, that on February 21, 1927, at Washington in the District of Columbia
did knowingly, wilfully, and unlawfully fail, neglect and refuse to answer certain questions propounded to him during his attendance before a committee of the Senate of the United States as a witness who had been summoned to give testimony upon a matter then under inquiry before said committee, and questions being pertinent to the matter then under inquiry before said committee.

In violation of Section 102 of the Revised Statutes of the United States, and against the peace and dignity of the said United States.

This deponent bases his knowledge, information and belief upon an indictment found by a Grand Jury of the United States of America in and for the District of Columbia, a duly certified copy of said indictment being hereto attached and made part hereof.

(S.) S. BUSHA.

Sworn to and subscribed before me at Philadelphia, this 26th day of April, 1928.

(S.) O. B. DICKINSON,
United States District Judge,
Eastern District of Pennsylvania.

WARRANT.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the United States Marshal for the Eastern District of Pennsylvania:

WHEREAS, the above affidavit has been made in writing before me, a United States District Judge for the Eastern District of Pennsylvania; that on February 21, 1927, at Washington, in the District of Columbia, Thomas W. Cunningham, hereinafter called the defendant, did knowingly, willfully, and unlawfully violate the statutes of the United States in manner and form as above set forth.

NOW, THEREFORE, You are hereby commanded to apprehend the said defendant, and bring the body forthwith before me, to answer the said complaint, that he may then and there be dealt with according to law.

Given under my hand and seal at Philadelphia, this 26th day of April, 1928.

(S.) O. B. DICKINSON,
United States District Judge,
Eastern District of Pennsylvania.

RETURN OF WARRANT.

Received this warrant on the 26th day of April, 1928, at Philadelphia, and executed the same by arresting the within-named defendant, at Philadelphia, on the 4 day of May, 1928, and have the body now in court as within I am commanded.

(S.) W. FRANK MATHUES,
United States Marshal,
Eastern District of Pennsylvania.
By (S.) CHAS. P. MALLON,
Deputy.

GOVERNMENT'S EVIDENCE AT THE HEARING, MAY 4, 1928.

Philadelphia, Pa., May 4th, 1928.

Before HON. OLIVER B. DICKINSON, *Judge.*

Present:

HOWARD BENTON LEWIS, ESQ., Assistant United States Attorney, for the Government.

HON. BENJAMIN M. GOLDER, and RUBY R. VALE, ESQ., for Defendant.

MR. LEWIS: May it please the Court, this is an application by the Government for a warrant of removal, to remand the defendant for trial. The defendant was indicted on April 20th, by a United States

Grand Jury, in the District of Columbia, charged with a misdemeanor, under Section 102 of the Penal Code, in that on February 21, 1927, at Washington, at a hearing of the Senate Committee before whom he had been summoned as a witness to testify, defendant refused to answer certain questions pertinent to the inquiry then pending before the Committee.

Upon a certified copy of the indictment being sent on to this jurisdiction, a warrant of arrest was issued directly out of this court under Section 1014 of the Revised Statutes.

THE COURT: Have you that section there?

MR. LEWIS: Yes. I shall read it in just a moment. On that warrant the defendant is in Court this morning, in custody of the Marshal.

In support of the application, the Government offers, first, the admission by the defendant—

THE COURT: (Interrupting) Before you go into that, Mr. District Attorney, I would like to get what it is we are on, straightened out in my mind. You have referred to it as an order of removal. What have we to do with that, now? As I understood you, you asked the Court to sit as a Committing Magistrate in lieu of taking the case before a Commissioner. Are not we hearing the case as upon the preliminary hearing, the same as a United States Commissioner would hear it, if it had taken that course?

MR. GOLDER: Yes.

(Informal discussion here ensued, off the record.)

THE COURT: Go ahead, we will hear the case.

MR. LEWIS: In support of the application of the Government, here this morning, it offers, first, the admission by the defendant that he is the same person

who refused to answer questions, and the same person that is named in the indictment.

Secondly, the Government offers the certified copy of the Indictment itself.

Copy of the document last above offered in evidence, reads as follows:

"IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

To all to whom these presents come, Greeting:

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA, } *ss:*

BE IT REMEMBERED, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the time hereinafter mentioned, among others, was the following proceeding, to wit:

Filed in Open Court Apr. 20, 1928, Frank E. Cunningham, Clerk

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.
Holding a Criminal Term.

District of Columbia, ss: April Term, A. D. 1928.

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That for a considerable period of time prior to the date of the finding of this indictment, the Senate of the United States has been greatly concerned and disturbed, in connection with the nomination and election of candidates for the office of member of the said Senate of the United States, by the bringing to the attention of the said Senate of the United States of certain allegations and charges of fraudulent, and corrupt, and unlawful practices in connection with such nomina-

tion and election of candidates in several States for the said office; and that consequently the said Senate of the United States has been keenly interested in the matter of securing information and data to permit the ascertainment and determination of the truth or falsity of such allegations and charges, as aforesaid, and to enable the said Senate of the United States to ascertain and determine what, if any, other or additional legislation might be advisable upon the general subject of the nomination and election of candidates for the office of member of the said Senate of the United States; and that as a consequence of the making of such allegations and charges, and for the purposes and under the circumstances aforesaid, the Senate of the United States, on May 19, 1926, did adopt a certain resolution (S. Res. 195), that is to say, a resolution of the tenor following:

RESOLVED, that a special committee of five, consisting of three members selected from the majority political party, of whom one shall be a progressive republican, and of two members from the minority political party, shall be forthwith appointed by the President of the Senate; and said committee is hereby authorized and instructed immediately to investigate what moneys, emoluments, rewards, or things of value, including agreements of understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate or to contribute to or promote the election of any person as a member of the United States Senate at the general election to he held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall hereafter

make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto.

Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary; to require subpœna or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee wilfully makes default, or who, having appeared, refused to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by Section 102 of the Revised Statutes of the United States.

Said committee shall promptly report to the Senate the facts by it ascertained.

And that on June 3, 1926, the Senate of the United States did adopt a certain other resolution (S. Res. 227), that is to say, a resolution of the tenor following:

RESOLVED, That the special Senate Committee created pursuant to Resolution 195, agreed to the 19th day of May, 1926, hereby is authorized to employ stenographic assistance, at a cost not exceeding 25 cents per hundred words, to report such hearings and proceedings as may be had in connection with any subject which may be before said committee and such clerical or other assistance as may be deemed necessary by the committee, that all expenses incurred, including costs of travel by the committee or their assistants, in furtherance of the purposes of said resolution, shall be paid out of the contigent fund of the

Senate upon vouchers properly approved. The costs of this investigation shall not exceed $10,000.

And that on June 30, 1926, the Senate of the United States did adopt a certain other resolution (S. Res. 258); that is to say, a resolution of the tenor following:

RESOLVED, That the limit of expenditure to be made under authority of Senate Resolution Numbered 227, agreed to June 3, 1926, be, and the same hereby is, increased from $10,000 to $50,000.

And that on January 11, 1927, the Senate of the United States did adopt a certain other resolution (S. Res. 324) that is to say, a resolution of the tenor following:

Whereas William B. Wilson, of the State of Pennsylvania, has presented his petition to the Senate of the United States contesting the election of William S. Vare as a Senator from Pennsylvania in the election held on the 2nd day of November, 1926; and

Whereas the said William B. Wilson charges in his petition fraudulent and unlawful practices in connection with the nomination and in connection with the alleged election of the said Vare as Senator of the State of Pennsylvania, and that unless preserved for the use of the Senate evidence relating to said charges and said election will be lost or destroyed; and

Whereas the special committee of five organized under Senate Resolution Number 195, Sixty-ninth Congress, first session by direction of the Senate has entered upon an investigation pertaining to alleged corrupt practices in the election held November 2, 1926, and in the primary proceeding it is the State of Pennsylvania; Therefore be it

RESOLVED, That the special committee of five constituted under Senate Resolution Number 195, Sixty-ninth Congress, first session, in addition to, and not in detraction from the powers conferred

in said resolution, be, and it is hereby, authorized and empowered:

(1) To take possession, in the presence of the said William S. Vare or his representative if the said William S. Vare desires to be present or to have a representative present, and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books and documents used in said senatorial election held in the State of Pennsylvania on the 2nd day of November, 1926.

(2) To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters or other acts or facts affecting the result of said election.

(3) That said committee is hereby vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

(4) That the Sergeant at Arms of the Senate and his deputies are directed to attend the said special committee and to execute its directions. That the said special committee may appoint subcommittees of one or more members with power and authority to act for the full committee in taking possession of evidence and in the subpœnaing of witnesses and taking testimony.

RESOLVED FURTHER, That the expenses incurred in carrying out this resolution shall be paid from the contingent fund of the Senate upon vouchers ordered by the Committee or any subcommittee thereof and approved by the chairman of the committee, the cost of same not to exceed $15,000 in addition to the moneys heretofore authorized to be expended.

Whereupon, and by force and under authority of the aforesaid resolutions, the said special com-

mittee of five organized under Senate Resolution Number 195, Sixty-ninth Congress, first session, which said committee is hereafter referred to in this indictment as 'the said committee,' was empowered and directed to investigate the entire subject of the alleged fraudulent and corrupt and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, with particular reference to the ascertainment and determination of facts in connection with the alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters, or other acts or facts affecting the result of said election, and to report its findings and recommendations to the Senate with a view to enabling the Senate to ascertain and determine what, if any, other or additional legislation might be advisable in the premises; that the said committee did in fact thereupon proceed to exercise that authority and to make such investigation, for the purpose of making such report, findings and recommendations to the Senate, with a view of enabling the Senate to ascertain and determine what, if any, other or additional legislation might be advisable, and the matters so referred to the said committee then and there, to wit, at Washington in said District of Columbia, therefore came under inquiry before the said committee and the said committee, for that purpose and in that behalf, did hold sundry hearings at which witnesses were examined and documents produced.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That thereafter, to wit, on the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, said matters and questions then and there still being matters and questions under inquiry before the said committee and Senate, it became and was a material matter

and question before the said committee to ascertain and determine the amount of the source of all moneys and other things of value contributed and donated by one Thomas W. Cunningham, for expenditure and for other use in connection with the nomination and in connection with the alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania; and that the said Thomas W. Cunningham, on the said Twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, having been theretofore, to wit, on the fifteenth day of February, in the year of our Lord one thousand nine hundred and twenty-seven, duly served with a subpœna issued by direction of said committee by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, on said twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, did appear before the said committee as such witness in obedience to such subpœna, and was then and there duly sworn; that thereupon the Honorable James A. Reed, a member and the chairman of the said committee, for said committee, propounded to the said Thomas W. Cunningham, a certain question which, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then and there under inquiry before the said committee as aforesaid; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: Mr. Cunningham, the committee has called you before it the second time in order to permit you an opportunity to answer the questions you declined to answer before, and afford you the opportunity to answer such other questions as may be put to you. Mr. Cunningham on your previous examination you stated (reading):

I handed money to Thomas F. Watson $25,000 on the 10th day of April, 1926.

Then this follows, as shown by the record of the proceedings (reading):

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

The Chairman: Your own private moneys?

Mr. Cunningham: Yes, sir; my own money; my own money.

The Chairman: How long had it been your own money?

Mr. Golder at that time stated an objection, which appears in the record.

The question was repeated as follows (reading):

The Chairman: How long had it been your own money?

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business,"

the said Honorable James A. Reed then and there said to said Thomas W. Cunningham,

"I now ask you the same question again, Mr. Cunningham", the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him the said Thomas W. Cunningham, an answer at that time and place

to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection

with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States for the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT:

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:
That, to wit, on the said twenty-first day of February in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this count by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth, in said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said first count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, and having appeared before the said committee as such witness, in obedience to the said subpœna and having been then and there

duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James A. Reed, a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then under inquiry before the said committee, as in the said first count set forth; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: Very well, the next question which was asked you was as follows (continuing reading):

The Chairman: Where did you get this $25,000 you say you gave to Mr. Watson?

Mr. Cunningham: I refuse to answer that question, I think that is personal."

The said Honorable James A. Reed then and there said to the said Thomas W. Cunningham:

"I now ask you, on behalf of the committee, the same question, and await your answer."

The said Honorable James A. Reed thereby meanby and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with

the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT:

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That, to wit, on the said twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this court by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth in, said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said first count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, and having appeared before the said committee as such witness in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James A. Reed, a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question of pertinence to said matters and questions then under inquiry before the said committee, as in the said first count set forth: that is to say, that having

made the following statement to the said Thomas W. Cunningham,

"The Chairman: The next question that was asked you as follows (continuing reading):

The Chairman: Where were you keeping the $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it."

the said Honorable James A. Reed then and there said to the said Thomas W. Cunningham,

"I now ask you the same question, that is, where were you keeping this $25,000 before you gave it to Mr. Watson?"

the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him, the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTH COUNT:

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That, to wit, on the said Twenty-first day of February, in the year of Our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this count by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth, in said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said fourth count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, and having appeared before the said committee as such witness, in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James A. Reed, a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then under inquiry before the said committee, as in the said first count set forth; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: Very well, you were asked a number of questions, which I will read for the context (continued reading):

The Chairman: Did you give this money to Mr. Watson in cash or by check.

Mr. Cunningham: I gave it to him as cash.

The Chairman: Where were you when you gave it to him?

Mr. Cunningham: I took it down to his headquarters at the Walton Hotel on the 10th day of April.

The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

The Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it."

The said Honorable James A. Reed then and there said to the said Thomas W. Cunningham,

"I now ask you again, where did you get it? That is, where did you get this money from to put in your pocket?"

the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him, the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable

James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FIFTH COUNT:

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That, to wit, on the said twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the District of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this count by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth, in said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said first count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said committee and to give testimony before the said committee, and having appeared before the said committee as such witness, in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James A. Reed a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then under inquiry before the said committee, as in the said first count set forth; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: Very well. The next question asked you was (continuing reading):

The Chairman: Mr. Cunningham, how long had you had this money in your possession?

Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it."

the said Honorable James A. Reed then and there said to the said Thomas W. Cunningham,

"I now ask you, how long had you had this money in your possession?"

the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him, the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare, as a member of the Senate of the United States from the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SIXTH COUNT:

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That, to wit, on the said twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and at and in the district of Columbia aforesaid, and under the circumstances and conditions and upon the occasion mentioned in the first count of this indictment, the allegations concerning which, in said first count contained, are incorporated in this count by reference as fully and completely as if they were here repeated, and while the matters and questions referred to and set forth, in said first count of this indictment, were matters and questions under inquiry before the said committee and Senate, the said Thomas W. Cunningham, as in the said first count set forth, having been duly served with a subpœna issued by direction of the said committee, and summoned by authority of the Senate of the United States, to appear before the said Committee, and to give testimony before the said committee, and having appeared before the said committee as such witness, in obedience to the said subpœna and having been then and there duly sworn, a certain other question was propounded to the said Thomas W. Cunningham, by the said Honorable James A. Reed, a member and the chairman of the said committee, for said committee, which question, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then under inquiry before the said committee, as in the said first count set forth; that is to say, that having made the following statement to the said Thomas W. Cunningham,

"The Chairman: You were then asked questions touching your salary, and after that, this question (reading):

The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: That is another personal question. I cannot answer that."

the said Honorable James A. Reed then and there said to the said Thomas W. Cunningham,

"I now ask you again, with this $25,000 which you refer to as the $25,000 that you gave to Watson, savings from your salary?"

the said Honorable James A. Reed thereby meaning and intending, as the said Thomas W. Cunningham then and there well knew and understood, to elicit from him, the said Thomas W. Cunningham, an answer at that time and place to a question which had been asked him on another occasion, and certain facts which then and there were within the knowledge of the said Thomas W. Cunningham, touching upon said alleged fraudulent, and corrupt, and unlawful practices in connection with the nomination and election of candidates for the office of member of the Senate of the United States, and the ascertainment and determination of facts in connection with the nomination and alleged election of the said William S. Vare as a member of the Senate of the United States from the State of Pennsylvania, and with particular reference to the ascertainment and determination of the amount and source of all moneys and other things of value contributed and donated by the said Thomas W. Cunningham for expenditure and for other use in connection with the nomination and alleged election of the said William S. Vare; and that the said Thomas W. Cunningham then and there unlawfully did refuse to answer the said question then so propounded to him by the said Honorable James A. Reed; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Leo A. Rover,
Attorney of the United States in and for the District of Columbia.

Orig.

Criminal No. 46931.

UNITED STATES

vs.

THOMAS W. CUNNINGHAM

Violation of Section 102 of the Revised Statutes.

Witnesses:

James F. Sellers
Hicklin Yeates

Filed in Open Court
Apr. 20, 1928.
Frank E. Cunningham, Clerk

A True Bill:-

Martin R. West
Foreman.

AUTHENTICATION.

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Frank E. Cunningham, Clerk of the said Court, do hereby certify that the copy of indictment, annexed to this certificate, is a true copy of the original on file and of record in said offices, and that said original indictment is pending in said Court.

Witness my hand and the seal of said Court, this 28th day of April, 1928.

Frank E. Cunningham, Clerk.

I, F. L. Siddon, Presiding Justice of said court, do certify the foregoing attestation by Frank E. Cunningham, Clerk of the said court, to be in due form.

Witness my hand and seal this 28th day of April, 1928.

(Signed) F. L. Siddon,
Presiding Justice.

I, Frank E. Cunningham, Clerk of the said court, hereby certify that the Honorable F. L. Siddons, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same Presiding Justice of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court, this 28th day of April, 1928.

(Signed)
Frank E. Cunningham, Clerk."

"COPY OF INDICTMENT
from
THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Criminal No. 46931

UNITED STATES
vs.
THOMAS W. CUNNINGHAM."

MR. LEWIS: The law on the subject is so familiar to this Court, that—

THE COURT: Suppose we finish with the evidence first. You have offered the indictment?

MR. LEWIS: Yes.

THE COURT: And, you rest.

MR. LEWIS: Yes, the Government rests.

DEFENDANT'S EVIDENCE AT THE HEARING.

MR. GOLDER: If the Court please, there is, perhaps, in this case, a different question involved than the case that was argued before Your Honor sometime ago. May I first indicate, briefly, what our understanding is as to the practice.

First, we are before your Honor, sitting as a Commissioner, as a committing Magistrate, as it were. Mr. Lewis and we have agreed that bail of $1,000 should be entered by the defendant in this case—

THE COURT: (Interrupting) For what purpose?

MR. GOLDER: For the purpose of allowing us to file a paper book, in the first instance, which will probably take three or four days after the Court has completed its finding—

THE COURT: Well, Mr. Golder, why not complete the record as to the evidential facts, before you go on with any discussion. Do you propose to offer any evidence?

MR. GOLDER: Yes.

THE COURT: Well, then, offer your evidence now, and we will get rid of that.

MR. GOLDER: There is a preliminary question, your Honor, that we would like to submit but I assume that it can be done after the evidence is offered.

THE COURT: I do not mean to break in on you, except to make a suggestion. If there is any reason for raising a question before you go ahead with your evidence, raise it.

MR. GOLDER: Your Honor has not had an opportunity, as yet, to examine the indictment, and it is rather difficult for me to express our position, and even more difficult for you to follow it, in view of the fact that you have not examined the indictment; but, Section 102 of the Revised Statutes provides that if a man is called before a Senate Committee, and declines to answer questions pertinent,—and the word "Pertinent" is used—to the inquiry, that he is then guilty of a misdemeanor.

Section 104 of the same Act provides that upon refusal of a witness to answer questions which have been put to him, which are pertinent, that the President of the Senate, shall refer the matter to the District Attorney for action. It must be certified by the President of the Senate to the District Attorney, for action. The District Attorney cannot initiate any proceedings.

The indictment which has been offered in evidence here merely sets forth some inducing clauses, and then picks out of the record, which is not made a part of the indictment, a series of questions, three or four of them. I read as follows:

> "That thereupon, the Honorable James A. Reed, a member and the chairman of the said committee, for said committee, propounded to the said Thomas W. Cunningham, a certain question which, as the said Thomas W. Cunningham then and there well knew, was a question pertinent to said matters and questions then and there under inquiry before the said committee as aforesaid; that is to say, that having made the following statement to the said Thomas W. Cunningham, and then is quoted from the record:

"The Chairman: Mr. Cunningham, the committee has called you before it the second time in order to permit you an opportunity to answer the questions you declined to answer before, and afford you the opportunity to answer such other questions as may be put to you. Mr. Cunningham, on your previous examination you stated:

"I handed money to Thomas F. Watson, $25,000, on the 10th day of April, 1926."

"Then, this follows, as shown by the record of the proceedings:

"The Chairman: Where did you get that money?

"Mr. Cunningham: I got the money out of my own private funds.

"The Chairman: How is that?

"Mr. Cunningham: Out of my own private funds.

"The Chairman: Your own private moneys?

"Mr. Cunningham: Yes, sir; my own money; my own money.

"The Chairman: How long had it been your own money?

"Mr. Golder at that time stated an objection, which appears in the record.

"The Chairman: How long had it been your own money?

"Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business."

Your Honor can therefore, see that the questions themselves are preceded by a statement in the indictment which is purely a legal conclusion, that Thomas W. Cunningham knew this question to be pertinent.

THE COURT: What difference does it make whether he did or did not, if it was pertinent?

MR. GOLDER: It does not make any difference, except if these questions were pertinent, the fact that the indictment said they were—

THE COURT: There is another question.

MR. GOLDER: That is exactly what we have in mind. The mere fact that the indictment, however, states he knew they were does not affect the situation. If the indictment presented shows upon its face that no crime has been committed, there can be no question of probable cause.

In other words, if the Court sitting as a committing Magistrate, or Commissioner, the indictment, itself, must show that a crime has been committed. In order to constitute a crime under this section, the witness must have refused to answer a question which was pertinent to the inquiry which the Senate was empowered to make.

Reading this indictment, sir, the Court sees that a series of questions, standing by themselves, mean nothing. The declaration in the indictment, wherein they used the word "pertinent", means nothing. Now, Your Honor, before you could hold the defendant to await the action of the Court, you would have to read the indictment, and see, as a matter of law, whether this indictment charges an offense. I submit that by reading the indictment, a series of four or five questions, Your Honor is unable to say, as a matter of law, that the indictment sets forth an offense by the witness. Your Honor is unable to say from an examination of the indictment, that the witness has failed to answer the questions pertinent to the inquiry which the Senate had a right to make.

There are six counts, if the Court please—each one being exactly the same—and in which a question, hanging by itself, and standing by itself, does not disclose that the witness was guilty of an offense against the United States Government.

It is unfair to ask Your Honor, without having had an opportunity to study the indictment, to rule on that question.

It is a question that is more or less involved, and counsel and I did not feel that we were justified in pressing Your Honor, this morning for a ruling upon that question. But, I would like Your Honor when you take up this indictment, to read these questions, and Your Honor will be able to see, then, whether these questions were pertinent to the inquiry which was being made, or whether, from this indictment, the Senate was empowered to make the inquiry.

In order, now, not to press Your Honor for a ruling, this morning, and subject to the objections we are making to the indictment, and in order to complete the record but without waiving any of our rights, we would like to offer in evidence, as I stated, subject to the objection which we made to the indictment, the record of the testimony taken before the Senate Committee. This, of course, cannot prejudice us, because it will not help the indictment if the indictment, itself, is defective.

THE COURT: You offer it is evidence, do you?

MR. GOLDER: Yes.

THE COURT: Is there any objection?

MR. LEWIS: No, sir.

THE COURT: Let it go in.

MR. GOLDER: The testimony appears in the record of the Senate hearings, starting on page 1706 and concluding on page 1715. This testimony was taken in Chicago, sometime during the Summer of 1926.

The testimony last above offered in evidence, is as follows:

"TESTIMONY OF THOMAS W. CUNNINGHAM.
(The witness was sworn by the Chairman.)

The Chairman: Let the record show the appearance of Mr. Golder.

Mr. Golder: Mr. Chairman, in the event that a question is asked which I consider one which Mr. Cunningham should not answer, may I address myself to the Chair or to Mr. Cunningham?

The Chairman: It would be entirely proper for you to address yourself to the Chair and state your objection, the same as you would to a court.

What is your full name, Mr. Cunningham?

Mr. Cunningham: Thomas W. Cunningham.

The Chairman: Where do you reside?

Mr. Cunningham: 2116 Cherry Street, Philadelphia.

The Chairman: How long have you resided in Philadelphia?

Mr. Cunningham: My whole life.

The Chairman: What is your occupation or business?

Mr. Cunningham: Clerk of the Quarter Sessions Court.

The Chairman: With what political organization were you connected during the recent primary in Pennsylvania—the last primary?

Mr. Cunningham: The Republican organization of Philadelphia County.

The Chairman: Who was the chairman of that organization?

Mr. Cunningham: Thomas F. Watson.

The Chairman: And what candidate for the Senate was that organization supporting?

Mr. Cunningham: Congressman Vare—W. S. Vare.

The Chairman: Did you collect any money for use in that campaign?

Mr. Cunningham: I did not.

The Chairman: Was any money given to you for use in that campaign?

Mr. Cunningham: No checks, no drafts, or anything.

The Chairman: That you got money on?

Mr. Cunningham: No, sir.

The Chairman: Did you handle any money in that campaign?

Mr. Cunningham: I did not.

The Chairman: Did you deliver any money to any person?

Mr. Cunningham: I did.

The Chairman: That is handling money, Mr. Cunningham?

Mr. Cunningham: I did not catch your way of saying that.

The Chairman: Very well. To whom did you give any money?

Mr. Cunningham: I handed money to Thomas F. Watson, $25,000 on the 10th day of April, 1926.

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

The Chairman: Your own private moneys?

Mr. Cunningham: Yes, sir; my own money; my own money.

The Chairman: How long had it been your own money?

Mr. Golder: Mr. Chairman, may I state an objection at this time?

The Chairman: You may.

Mr. Golder: I have advised Mr. Cunningham that, in my judgment, this committee has no jurisdiction to inquire into the primary election held in Pennsylvania; that it is only a local matter for the Commonwealth of Pennsylvania; and that in my professional judgment he can answer those questions which he sees fit dealing with the primary election, and that he may refuse to answer those questions which he considers his own personal business. I have further advised Mr. Cunningham that he need not disclose to this committee from what part of his personal estate, or personal fortune, he paid the money, to Mr. Wat-

son that he did pay during this last campaign in Pennsylvania.

I thought I would state that as a matter of record so that I would not have to object each time a question is asked.

The Chairman: What was my last question?

(The question was read by the reporter as follows:)

The Chairman: How long had it been your own money?

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business.

The Chairman: Where did you get this $25,000 you say you gave to Mr. Watson?

Mr. Cunningham: I refuse to answer that question. I think that is personal.

The Chairman: Where were you keeping this $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it.

The Chairman: Did you give this money to Mr. Watson in cash or by check?

Mr. Cunningham: I gave it to him as cash.

The Chairman: Where were you when you gave it to him?

Mr. Cunningham: I took it down to his headquarters at the Walton Hotel on the 10th day of April.

The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

The Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it.

The Chairman: How long had you had this money in your possession?

Mr. Cunningham: That is another personal question, I decline to answer it. It was my own money, and I do not think I should tell the public

where I kept it and how I got it, or anything else about it.

The Chairman: How long have you been clerk of the Quarter Sessions Court?

Mr. Cunningham: Twenty-one years the 1st of January, 1926.

The Chairman: What is the salary of that position?

Mr. Cunningham: $8,000 a year.

The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: That is another personal question. I cannot answer that.

The Chairman: Unfortunately, a good many questions are personal.

Mr. Cunningham: Yes. I think a man's own money is one of his own personal privileges, and he is not supposed to tell how he got it or how he saved it. I think that is a rather unfair question to ask me, how I got the money, how I saved it, and what I done with it.

The Chairman: I dare say. Is there anything wrong or wicked or crooked about the way you got this money, so that it will embarrass you to answer the question or will subject you to criminal prosecution?

Mr. Golder: I think that is an unfair question, Senator, and I advise Mr. Cunningham to disregard it.

The Chairman: If you were to answer the questions I have asked you with regard to the sources from which and the way in which this money came to you, would it tend to subject you to criminal prosecution or public contempt or obloquy?

Mr. Golder: Senator Reed, I think that question is objectionable in form and the way in which it is put, and I advise Mr. Cunningham not to consider it, or not to answer it.

The Chairman: Do you refuse to answer, Mr. Cunningham?

Mr. Cunningham: Yes, I refuse to answer.

Mr. Golder: You see, Senator, when you ask a question which you know that I have advised Mr. Cunningham not to answer, and put it in such a way as you have, it necessarily implies something which is unsavory, and I think it is an unfair way for you to treat a witness.

The Chairman: Well, now, we have permitted you to sit here as an act of courtesy, but we will not permit any criticism of the committee from you.

Mr. Golder: Senator Reed, you have permitted Mr. Cunningham to have his attorney here, and I assume you will not compel me to advise Mr. Cunningham except as I think best.

The Chairman. You will maintain a respectful and decent attitude or you will not sit at this table very long as anybody's attorney.

Mr. Golder: Senator Reed, I have the utmost respect for the Committee and for its membership.

The Chairman: You may make your objections and make them in a proper way.

Mr. Cunningham, is there any other reason than the one you have given, or are there any other reasons than those you have given, why you refuse to answer the questions that have been put to you touching the sources from which the $25,000 came? Have you any other reasons than those you have given?

Mr. Cunningham: That is all, Senator; just personal reasons.

The Chairman: Very well; that is all I want to cover.

Mr. Cunningham: All right, sir.

The Chairman: Where were you when the subpœna was issued for you from this committee, while it was having its sessions in Washington?

Mr. Cunningham: I went on a vacation on the 19th day of June and did not get back until the 8th day of July.

The Chairman: Where were you during that interval?

Mr. Cunningham: I was on an automobile tour up through the southern coast of New Jersey.

The Chairman: What places did you visit?

Mr. Cunningham: I think that is a private, personal question, Senator. I would not answer it.

The Chairman: Where did you stay nights?

Mr. Cunningham: I think that is another private question, as I have said. What material difference does it make? I am not in the habit of telling where I went and what I done; never have in my life, Senator.

The Chairman: You knew that a subpœna had been issued for you, didn't you?

Mr. Cunningham: The last three or four days I got in touch with the papers, and I found out that there were subpœnas, according to the newspapers, and I came back to Philadelphia on the 8th day of July.

The Chairman: Did you give any other money than the $25,000 to anybody during this campaign?

Mr. Cunningham: Yes; on the 13th of April I gave Mr. Watson $25,000 more.

The Chairman: So that you gave Mr. Watson a total of $50,000?

Mr. Cunningham: $50,000; of my own money.

The Chairman: Where did you get the second $25,000 from?

Mr. Cunningham: I refuse to answer that question, Senator.

The Chairman: You refuse to tell the committee anything about where you received this money from?

Mr. Cunningham: Yes, I do.

The Chairman: The sources from which the money was received?

Mr. Cunningham: Yes.

The Chairman: How long had the money been in your possession? You refuse to tell that to the committee?

Mr. Cunningham: I certainly do, because I think that is a personal, private question.

The Chairman: How long have you been saving up or accumulating this $50,000?

Mr. Cunningham: I do not like to object to your questions, Senator, because I think a man's own money—Why, I don't want to make it public

to the press, to the newspapers in Philadelphia, about my private affairs, how I got this money, or how I saved it.

The Chairman: Have you inherited any considerable sums of money

Mr. Cunningham: Never inherited a dollar in my life.

Mr. Chairman: Have you been speculating in stocks or bonds or upon the board, so that you accumulated the money in that way

Mr. Golder: I object to that question and advise Mr. Cunningham that he need not answer.

The Chairman: What does the witness say?

Mr. Cunningham: I refuse to answer.

The Chairman: Have you turned in on your tax returns any $50,000 for taxation purposes?

Mr. Golder: I object to that question, Senator, and advise the witness that he need not answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Have you paid to the State of Pennsylvania, the county in which you live, or the city in which you live, any taxes upon this $50,000?

Mr. Golder: I object to that question, Senator, and advise the witness that he need not answer. As a matter of fact, there is not taxation in Pennsylvania on any such amount.

Mr. Cunningham: I refuse to answer, Senator.

The Chairman: Have you returned to the Federal Government this $50,000 in any form?

Mr. Golder: I object to that question, Senator, and advise the witness he need not answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Did you collect any money from persons employed either by the City of Philadelphia or by the State of Pennsylvania?

Mr. Cunningham: Not a dollar.

The Chairman: Were any moneys paid to you by any of these persons I have just referred to?

Mr. Cunningham: No, sir.

The Chairman: Do you know of any collection of money from State employees for political purposes?

Mr. Cunningham: I do not, Senator.

The Chairman: Do you know of any contributions by the employees of the City of the Vare campaign?

Mr. Cunningham: I will tell you for information that in the primary election there is never any assessment of any kind. In primary elections we never heard tell of any donations from employees.

The Chairman: In the primaries?

Mr. Cunningham: In the primary elections.

The Chairman: Do you know Martin Powers?

Mr. Cunningham: Yes, sir.

The Chairman: Did you spend any of this vacation at his home in New Jersey?

Mr. Cunningham: How is that?

The Chairman: Did you spend any part of your vacation in company with Mr. Martin Powers?

Mr. Golder: Mr. Chairman, I object to that question. The witness has already testified that he declines to state where and with whom he spent his vacation.

The Chairman: I did not ask him with whom he spent it until just now.

Mr. Golder: I advise the witness that he need not answer that question.

Mr. Cunningham: I refuse to answer the question, Senator.

The Chairman: Did you leave the City of Philadelphia with Mr. Powers?

Mr. Golder: I advise the witness that he need not answer that question, Senator.

Mr. Cunningham: I did not.

The Chairman: Did you leave the City of Philadelphia in an automobile?

Mr. Golder: I advise the witness that he need not answer that question, Senator, it being entirely immaterial and a personal matter.

Mr. Cunningham: I refuse to answer.

The Chairman: Whose car did you leave in?

Mr. Golder: I advise the witness that he need not answer that question.

Mr. Cunningham: I refuse to answer, Senator.

The Chairman: You say you know Mr. Powers. What is his business?

Mr. Cunningham: I have known Mr. Powers from boyhood. He is a member of the bar, attorney-at-law.

The Chairman: Is he connected with a trust company in Philadelphia?

Mr. Cunningham: I do not know.

The Chairman: Did Mr. Powers formerly have a partner who is now president of a trust company?

Mr. Golder: I advise the witness that he need not answer that question.

The Chairman: Oh, well, now, that is getting to be sheer insolence, to advise a witness not to answer a question of that kind. It could not possibly harm this witness.

Mr. Golder: Perhaps not, Senator; but it might lead to other things. I think we ought to draw the line of advising the witness what he may answer and what he should not answer.

Mr. Cunningham: I do not know anything at all about that, Senator.

The Chairman: If you came here to tell this witness that he should not answer any questions, whether it is pertinent or not, you are abusing the courtesy of the committee extended to you, whether it is a thing that could possibly affect his own honor or his own private business.

Mr. Golder: Senator, I do not agree with you; and I am sorry to disagree with you.

The Chairman: Well, I am sorry you do.

Mr. Golder: But I must use my own judgment.

The Chairman: You may use it as long as we permit you to sit here; but if you abuse the privilege you will not sit here.

Mr. Golder: I do not intend to abuse it, Senator.

The Chairman: Well, you are abusing it. Did Powers formerly have a partner whose name began with 'Mac'?

Mr. Cunningham: I do not know the first thing about it, Senator. I do not know anything at all about Powers' private business whatever.

The Chairman: Did you have in your possession, of your own money, 30 days before you say you gave this money to Watson, as much as $1,000?

Mr. Cunningham: As much as $1,000?

The Chairman: Yes.

Mr. Cunningham: Oh, yes, sir.

The Chairman: What bank do you bank in?

Mr. Golder: Mr. Chairman, I object to that question, and advise the witness that he need not answer.

The Chairman: What is the answer of the witness?

Mr. Cunningham: I refuse to answer.

The Chairman: Have you ever had a bank account anywhere?

Mr. Cunningham: Sure.

The Chairman: Where?

Mr. Cunningham: I have a bank account for my office.

The Chairman: A bank account in your office?

Mr. Cunningham: I say I have to run my office, and therefore I have to use a bank account for the proceeds of my office.

Mr. Chairman: Is that your personal account?

Mr. Cunningham: One of them is; yes.

The Chairman: What bank is it in?

Mr. Golder: Senator, I object to that question and advise the witness he need not answer where he deposits his money, it being entirely a private matter.

Mr. Cunningham: I refuse to answer.

The Chairman: I do not intend to get into an argument with you, Mr. Golder. You know perfectly well that when a man states that he had $50,000, and it was his own money, and assuming, now, that this committee has any jurisdiction—which I understand you challenge, and which you have a right to challenge—we have the right to test the reasonableness of that story. We are not concluded by the bald statement that it was the witness' own money; and so we have a right to know, assuming that we have any right at all to

conduct this investigation the source from which this money came, in order that we may ascertain whether, as a matter of fact, the witness did have it. So, with that explanation, I am asking the witness where he kept his bank account.

Mr. Golder: Senator, may I be permitted to state our position?

The Chairman: You have stated it, I think.

Mr. Golder: May I repeat it, then, in answer to what you have just said?

My position is that this committee had no right, in the first place, to inquire whether this witness contributed anything to the Pennsylvania Primary. If the witness saw fit to state that he did, that does not waive any right that he may have to refuse to answer any other question connected or disconnected with the $50,000. I do not think this committee had any right to inquire into the $50,000 initially.

The Chairman: And, of course, you think that your opinion is the final word as to the law?

Mr. Golder: It will be with Mr. Cunningham, at least at this time.

The Chairman: We will ascertain whether that is true or not a little later. How long have you known Congressman Vare?

Mr. Cunningham: Ever since I have been a boy—35 or 40 years, I guess.

The Chairman: Were you in any way connected with his campaign committee, the committee which was conducting his campaign in the last primary?

Mr. Cunningham: Only in one way; I was for him after he concluded to be a candidate for United States Senator.

The Chairman: Did you ever talk with him?

Mr. Cunningham: I talked with him on several occasions about it.

The Chairman: With him during the campaign?

Mr. Cunningham: No, sir. This was prior to the campaign, before he came out as a candidate.

The Chairman: Did you urge him to come out?

Mr. Cunningham: No; I rather urged the other way, Senator.

The Chairman: When he did come out, you became one of his supporters?

Mr. Cunningham: Because our organization, as a rule—if the majority make up their mind to be for a candidate—the majority made up their minds for William S. Vare, and I went along with the majority.

The Chairman: When you speak of 'our organization,' what organization do you mean?

Mr. Cunningham: The Republican City Committee of Philadelphia. We have 48 wards; 48 members of that committee.

The Chairman: Are you a member?

Mr. Cunningham: A member of that committee; yes, sir.

The Chairman: For which ward?

Mr. Cunningham: The tenth ward.

The Chairman: During the campaign, then, after the organization resolved to support Vare, you gave him your loyal support?

Mr. Cunningham: Yes, sir.

The Chairman: Who asked you to make this contribution of $50,000?

Mr. Cunningham: Nobody asked me, Senator, I will tell you the reason why I made this contribution.

I was a Penrose man to the day he died, in Philadelphia. Eddie Beidleman and Harry Baker have been the same as my own two sons, and were very close friends of Penrose's to the day of his death. Beidleman's ambition was to be governor. I was for Beidleman four years ago. George Alder was picked, and he had to step aside. This time I thought that he would make the best governor of Pennsylvania ever had. I thought he was the most practical man in the State of Pennsylvania, a man who was a member of the legislature, State senator for four years, lieutenant governor four years, and a real man, and I thought he would make the best governor Pennsylvania ever had, and I was very fond of him. Now, that was my whole interest.

The Chairman: Had you ever made any such contribution as this before out of your own money?

Mr. Cunningham: Never before in my life. I had made small contributions, a hundred or five hundred dollars at different times, to help some poor fellow running for council.

The Chairman: Are you a man of considerable means, Mr. Cunningham?

Mr. Cunningham: Well, pretty fairly at the present time.

The Chairman: Did you draw this money out of any bank?

Mr. Cunningham: No, sir.

The Chairman: How long had you had it in your pocket?

Mr. Golder: Mr. Senator, I think we have had that question up before, and I advised him not to answer.

Mr. Cunningham: I think I answered that before.

The Chairman: I thought you might change your mind.

Mr. Cunningham: No. You are so nice about it, anybody would change their mind if he felt inclined to change it, Senator.

The Chairman: I desire to be nice to everybody.

Mr. Cunningham: I know it; I have seen that since I have been here, the last four days.

The Chairman: You are the only man who has come here who has been unwilling to tell where he got his money.

Mr. Cunningham: Well, Senator, I am an American citizen. I was born in the greatest American city today in the United States, Philadelphia, and I have never been used to telling people where I went or what I done or how I made my money, and I am too old now to change my thought of mind.

The Chairman: You just formed the habit of independence?

Mr. Cunningham: I formed that habit through my late friend, Senator Penrose. I guess I learned that trick from him—saving money and putting it

away and keeping it under cover. I have been with him, and I was his friend to the day he died.

The Chairman: You say you learned this habit of putting it away, from Penrose?

Mr. Cunningham: Yes, sir. He was a past master in not letting his right hand know what his left hand done, and he dealt absolutely in cash. The 'long green' was the issue.

The Chairman: Is there any danger involved in your right hand knowing what your left hand does?

Mr. Cunningham: Well, I never let it be known.

The Chairman: You do not even want to know, yourself?

Mr. Cunningham: Sometimes I really do not.

The Chairman: And that is one of the attributes of independence in Pennsylvania, is it?

Mr. Cunningham: Yes, sir.

The Chairman: That your right hand shall not know what your left hand does?

Mr. Cunningham: Yes, sir. If a great many people would do that, there would not be so much trouble in Chicago and other big cities.

The Chairman: That is, you mean by that, I think, Mr. Cunningham, that if you do a thing secretly enough, so that nobody ever finds out about it, you never have any trouble about it?

Mr. Cunningham: So long as you do it honestly it is all right, Senator.

The Chairman: And if you are doing it honestly, all the more reason for secrecy, I presume?

Mr. Golder: Senator, are you not really arguing with the witness?

The Chairman: I am trying to get the witness' mental slant on this. Mr. Cunningham, I want to be perfectly frank with you. It will be the duty of the committee to report you to the United States Senate for contempt. That is not a threat; we are not making threats. That is the fact. Then, of course, it will have to be determined whether you have to answer these questions. What the result may be will have to be determined by the Senate and possibly by the

courts. I think it is only fair to make that statement to you, and having made it, I ask you if you adhere to the position you have taken in your various refusals to answer?

Mr. Golder: Senator, your voice dropped near the end; I do not think Mr. Cunningham heard all that you said.

The Chairman: The stenographer will read my statement.

(The reporter read as follows:)

Mr. Cunningham, I want to be perfectly frank with you. It will be the duty of the committee to report you to the United States Senate for contempt. That is not a threat; we are not making threats. That is the fact. Then, of course, it will have to be determined whether you have to answer these questions. What the result may be will have to be determined by the Senate and possibly by the courts, I think it is only fair to make that statement to you, and having made it, I ask you if you adhere to the position you have taken in your various refusals to answer?

Mr. Cunningham: I do, Senator.

The Chairman: Very well, that is all, sir."

Mr. Golder: The second portion of testimony, is that which was taken in Washington, on February 21st, 1927. This testimony appears on pages 3390 to 3393 of the Senate hearings.

May I repeat, Your Honor, in order that the record may be perfectly clear, that this testimony is only offered now in the event that Your Honor shall rule against us on the proposition as the indictment, itself, does not set forth an offense, in the interest of saving time, and in fairness to all concerned.

Testimony reads as follows:

"(The witness was sworn by the chairman.)

Mr. Golder: Mr. Chairman, if any questions are asked which I consider Mr. Cunningham should not answer, should I address myself to the Chair?

The Chairman: Yes. Your full name is—

Mr. Cunningham: Thomas W. Cunningham.

The Chairman: You are the Thomas W. Cunningham who appeared before this committee?

Mr. Cunningham: I am.

The Chairman: And gave certain testimony, and refused to answer certain questions at the previous hearing?

Mr. Cunningham: Yes, sir.

The Chairman: Mr. Cunningham, the committee has called you before it the second time in order to permit you an opportunity to answer the questions you declined to answer before, and afford you the opportunity to answer such other questions as may be put to you.

Mr. Cunningham: On my previous examination you stated (reading):

I handed money to Thomas F. Watson $25,000 on the 10th day of April, 1926.

Then this follows, as shown by the record of the proceedings (reading):

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

The Chairman: Your own private moneys?

Mr. Cunningham: Yes, sir; my own money; my own money.

The Chairman: How long had it been your own money?

Mr. Golder at that time stated an objection, which appears in the record. The question was repeated, as follows (reading):

The Chairman: How long had it been your own money?

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business.

I now ask you that same question again, Mr. Cunningham.

Mr. Cunningham: Same answer.

The Chairman: On behalf of the committee, I instruct you to answer the question.

Mr. Cunningham: I refuse to answer, Senator.

The Chairman: Very well. The next question which was asked you was as follows (continuing reading):

The Chairman: Where did you get this $25,000 you say you gave to Mr. Watson?

Mr. Cunningham: I refuse to answer that question. I think that is personal.

I now ask you, on behalf of the committee, the same question, and await your answer.

Mr. Cunningham: I refuse to answer.

The Chairman: On behalf of the Committee, I instruct you to answer.

Mr. Golder: Mr. Chairman, may I—

The Chairman: No; you may not. This man is getting along all right.

Mr. Cunningham: I refuse to answer, Senator.

The Chairman: Now, you may make any suggestion you want to.

Mr. Golder: Too late, now, Senator.

The Chairman: I do not intend that you shall suggest the answers to a witness while I am examining him. You may make any objection you want to.

Mr. Golder: I addressed myself to the Chair, Mr. Chairman.

The Chairman: I want to extend every courtesy and every right.

Mr. Golder: You usually do, Senator. I do not think you understood me.

The Chairman: The next question that was asked you was as follows (continuing reading):

The Chairman: Where were you keeping this $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it.

I now ask you the same question, that is, where were you keeping this $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: I refuse to answer.

The Chairman: Again I instruct you, on behalf of the committee, to answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Very well. You were asked a number of questions, which I will read from the context, (continuing reading):

The Chairman: Did you give this money to Mr. Watson in cash or by check?

Mr. Cunningham: I gave it to him as cash.

The Chairman: Where were you when you gave it to him?

Mr. Cunningham: I took it down to his headquarters at the Walton Hotel on the 10th day of April.

The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

The Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it.

I now ask you again, where did you get it? That is, where did you get this money from to put in your pocket?

Mr. Cunningham: I refuse to answer.

The Chairman: And I direct you, on behalf of the committee, to answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Very well. The next question asked you was (continuing reading):

The Chairman: Mr. Cunningham, how long had you had this money in your possession?

Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it.

I now ask you, how long had you had this money in your possession?

Mr. Cunningham: I refuse to answer.

The Chairman: Again I instruct you to answer?

Mr. Cunningham: I refuse to answer.

The Chairman: You were then asked questions touching your salary, and after that, this question (reading):

The Chairman: Was this money which you refer to as the $25,000 that you gave to Mr. Watson, savings from your salary?

Mr. Cunningham: That is another personal question. I cannot answer that.

I now ask you again, was this $25,000 which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: I refuse to answer.

The Chairman: And I instruct you, on behalf of the committee, to answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Now, Mr. Cunningham, you recall the testimony you gave before, I take it, fairly well?

Mr. Cunningham: I think I do, Senator.

The Chairman: We have called you here for the purpose of giving you an opportunity to purge yourself of what we regard as contempt of the committee and of the Senate. Do you still stand upon your refusal to answer the questions which were asked you on the previous hearing?

Mr. Cunningham: I do, sir.

The Chairman: You have nothing to say further as to your reasons for refusing to answer than you stated before?

Mr. Cunningham: I have not.

The Chairman: Mr. Cunningham, I think you will have to agree that at least the committee has given you every opportunity to make an explanation. If you do not desire to make it, of course, you have the right.

Mr. Cunningham: The only thing I was interested in, as I told you before, Senator, was Beidleman, and not any other project. If he had not been on the ticket I would not have given it.

The Chairman: Do you know whether it was reported in Mr. Beidleman's campaign expenses?

Mr. Cunningham: I really do not know that. I instructed Mr. Watson what my thought was

about it, because he had been a friend of mine for forty odd years, and that was my only interest in it.

The Chairman: You are excused from further attendance on the committee, sir."

(Whereupon, counsel for the defendant argued in support of their contention, that the warrant of removal should not be issued, and Mr. Lewis, on behalf of the Government, replied thereto.)

(Decision reserved.)

OPINION SUR HEARING UPON PETITION, WRIT, RETURN AND TRAVERSE.

(Filed May 10, 1928.)

DICKINSON, *J.*

We have entitled this cause as above. There are in form three proceedings.

1. Hearing by the Court sitting as a Committing Magistrate under R. S. 1014.

2. Motion for warrant of removal.

3. Hearing upon writ of Habeas Corpus.

For the convenience of the Court and of counsel and parties, it was arranged that the Court should sit as a Committing Magistrate and as such would determine all questions which might be raised in any one or all of the proceedings listed. If the Court was of opinion that the defendant should not be held for trial no other steps need be taken. If, however, the Court should hold the defendant for trial, then a formal commitment should issue and a formal motion be made to remove the defendant who being in custody under such com-

mitment should then ask for a writ of Habeas Corpus. All questions which might arise would however, as above stated, be discussed in the one argument and disposed of in one opinion. Leave was further given to file Briefs, after consideration of which the Court was to file its opinion in accordance with which the called for formal orders would be entered.

The cause is now ripe for a ruling.

The conclusion reached is that the relator in the Habeas Corpus proceeding and the defendant in the others should be committed for trial. This means that the removal order should be allowed; the petition for the writ of Habeas Corpus be dismissed and the relator remanded. Upon appeal taken he is to be enlarged pending appeal upon bail being entered.

DISCUSSION.

We see no real need to discuss the questions raised at the argument at Bar but defer to the wish of counsel to put an expression of our views upon record. In the opinion the relator is named defendant. The defendant was indicted by the Grand Jury of the District of Columbia for the offence defined and denounced in R. S. 102. Aside from the verbiage of the Act of Congress, the real offence is that when a witness before a Committee of the Senate the defendant in contempt of the tribunal conducting the inquiry then being made refused to answer a pertinent question addressed to him. The evidence before us consists of the indictment mentioned and the stenographic report of the hearing then being conducted. We have often had occasion to state that a right of great practical value belongs to every one charged with crime. It is expressed in the formulation of the broad question of whether he ought to be put upon his trial. This is the question which it is the special duty of committing Magistrates and Grand Juries to determine. Indeed it is the special and only

duty which they perform. On occasion Courts declare the answer to the same question and this is the question before us. Put thus broadly the suggested answer is in the affirmative. This defendant was a witness before a lawfully constituted tribunal; he was asked a series of questions which he refused to answer and the consequence is that he should stand trial for the charged offence. Why should he not? The distinction is an obvious one, but should be kept in mind, between the propriety of the defendant being put on trial, and the other question of his guilt. None the less if, on the showing date, the defendant is not charged with a legal offence or if what is called probable ground for belief in his guilt does not appear, there would be no justification for compelling him to stand trial. It is this proposition on which the defendant takes his stand. It is a legal truth that no proof, however clear, of a defendant's guilt can be accepted in a Court of Criminal law unless he has been in due form first charged with the commission of the offence. Due form embraces the two thoughts of the statement of a substantive offence and the verbiage chosen to give it expression. If the former be lacking in an indictment all are agreed that the defendant should not be held for trial. In the case of the latter however the question divides. If raised in the trial Court it could be raised by a demurrer. The Courts of the United States are commanded to disregard even a well founded criticism of an indictment because inartificially or indeed defectively drawn unless some right of the defendant be, in the opinion of the Court, prejudiced thereby. Hence the division of the question above mentioned. The first part of the question becomes one of which is the tribunal which is to find whether any right of the defendant is affected by the defect in the indictment. Should the Court in, for illustration, a Habeas Corpus hearing or the trial Court make the finding? Here it often may be found

that there is such an overlapping of the thoughts referred to that one becomes the other. A defect in verbiage may be so great as that no substantive charge can be extracted from it or it may be so near the boundary line that it may be viewed as a case of the absence of a substantive charge or as one of a denial to the defendant of his right to be informed of the charge made against him. Here we think the rule to be followed is that if the act with the commission of which the defendant is charged is one which has not been made a criminal offence by the law, the defendant should not be required to stand trial; if, however, the indictment may be so read as to charge a criminal act and the question is one which turns upon the verbiage employed, the question of the sufficiency of the indictment should be referred to the trial Court.

Benson vs. Henckel, 198 U. S. 1;
Beavers vs. Henckel, 194 U. S. 82;
Ex rel. Mayer, not yet reported, opinion filed April 19th, 1928;
Ex rel. Tassell, 11 Fed. Rep. (2nd), 53;
Swan vs. U. S., 23 Fed. Rep. (2nd) 148.

Applying these general principles to the fact situation of the instant case, we have questions raised which, for the purpose of this discussion, may be summarized as we have with no attempt at fullness and perhaps inadequately formulated them.

1. Absence of probable cause.

The gist of the offence charged is the refusal to answer one or more pertinent questions. No one of the questions stated in this indictment was either pertinent or relevant to the inquiry before the Senate Committee but on the contrary were probings into the purely personal, private affairs of the witness

with which neither the Senate nor the public interests of the inquiry had any concern. The broad question of the propriety of a particular interrogatory or the narrower one of the relevancy or pertinency of evidence to be elicited thereby is a question which cannot be ruled upon consideration of the naked question alone. It must have read into it all its environments, including the atmosphere of the trial and the personality and demeanor of the witness. None but the trial Court (or an Appellate Court upon a review of the whole trial) can make the called for ruling. An incident of the argument at Bar illustrates this truth. The questions addressed to the defendant were compared with amair of triumphant humor to a question addressed to a supposititious witness who had testified on examination in chief to specific acts which had no relation to cats. The supposed question on cross-examination was "did you ever see a cat which had five legs"? If the trial Judge had nothing to guide him to a ruling other than the question itself it is clear that he would disallow it. If, however, the atmosphere of the trial and the personality of the witness suggested the probability that the witness was unbalanced; that he was crazy on the subject of cats and that one of his insane delusions was that every cat had five legs and would so answer the question, it is just as clear that the question was pertinent and the answer had a direct bearing upon the credibility of the witness.

In the view we take the pertinency of the questions asked is not one by which we should determine the other question of whether this defendant should stand trial, and in consequence we should pass no opinion upon the question of pertinency further than the statement of the broad proposition that we decline to rule that no substantive offence is charged in this indictment.

2. The substantive offence charged against the defendant is one of contempt in that he had defied the authority of the Senate of the United States by refusing to answer pertinent questions addressed to him which he had been required to answer.

It is objected that the evidence shows that no such offence was committed. All it shows is that the witness exercised his right to object to the questions asked and to decline to answer them because they were impertinent and irrelevant in that they asked for a disclosure of personal, private matters which had nothing to do with the matters of public concern under inquiry nor with the business of the Senate or its Committee. The evidence shows that no ruling was made upon his objection nor was he directed to make answer to any of the questions asked. Not having been put in contempt he could not be guilty of the offence of contempt.

Again, our view is that this raises the question of guilt with which this Court has nothing to do sitting as a Committing Magistrate, or upon Habeas Corpus hearing or upon a motion for an order of removal. We again limit ourselves to the ruling that the defendant should stand trial at which this and all other matters of defence may be urged.

3. If the offence charged is viewed as one not for a contempt but one under Section 102 of the Criminal Code for a refusal to answer "pertinent" questions, then the objection is raised that there is no evidence that the questions asked were pertinent. The only evidence against the defendant is the indictment and it is barren of any averment that the questions were pertinent. The record of the proceedings in which the questions were asked and the questions themselves show that they were not pertinent and that the facts sought to be elicited were wholly irrelevant to the inquiry being conducted.

The effect of the evidence has already been sufficiently discussed. The other question is one of the sufficiency of the averments of the indictment. We assume the defendant is at full liberty to raise the suggested question respecting the indictment when his case is called for trial or at an earlier stage in the trial Court. At all events, we repeat the ruling already several times made that it is beside our province to determine the question raised and because of this we do not discuss it.

Appropriate orders in accordance with this opinion may be submitted.

PETITION FOR WRIT OF HABEAS CORPUS.

(Filed May 10, 1928.)

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

1. Your petitioner, Thomas W. Cunningham, respectfully represents to your Honorable Court that he is a citizen of the United States and a resident of the City and County of Philadelphia, State of Pennsylvania, within this judicial district.

2. Your Petitioner further represents that he is now actually, unjustly and unlawfully imprisoned and restrained of his liberty and detained by W. Frank Mathues, United States Marshal, by virtue of a warrant of removal issued to the said W. Frank Mathues, by the Honorable Oliver B. Dickinson sitting as a United States Commissioner.

3. That in the application for a warrant of removal before the Honorable Oliver B. Dickinson, sit-

ting as commissioner aforesaid, the United States Attorney for the Eastern District of Pennsylvania, George W. Coles, Esquire, acting through his lawful deputy, presented as evidence of probable cause for said removal a certain indictment found by the Grand Jury of the District of Columbia of the United States and no other testimony.

4. That your Relator, Thomas W. Cunningham, in rebuttal of said affidavit, presented and put in evidence at said hearing the entire transcript of the questions and answers propounded to him by a certain committee of the United States Senate, first at Chicago, Illinois, and secondly at Washington, D. C.

5. That your Petitioner has never been guilty of any crime against the United States of America and in particular of any violation of Revised Statutes No. 102 of the United States of America, in that he has at no time failed, neglected or refused to answer any questions pertinent to any inquiry made by either House of Congress or by a Committee of either House of Congress, concerning a matter over which each House had jurisdiction to investigate.

6. That there was not sufficient evidence of probable cause presented at the hearing aforesaid, in that the indictment offered and received in evidence was totally lacking in precision and particularly in the allegations of the essential elements necessary to describe a violation of Revised Statute No. 102, as aforesaid. That said indictment, together with the transcript of the testimony upon which it must be based, failed to disclose, inter alia, that the questions therein set forth at large, which your Relator refused to answer, were pertinent questions in the inquiry then being made by the particular Committee of the United States Senate therein described; that said indictment

and the evidence aforesaid showed conclusively that none of the questions and answers set forth in said indictment had anything to do with the General Election of William S. Vare, a candidate for United States Senate, therein referred to and that said indictment failed to allege and disclose that the inquiry which said Senate Committee was then making was one over which by the Constitution of the United States they had jurisdiction and authority.

7. Your Petitioner further avers that despite the above facts, the Judge aforesaid, sitting as United States Commissioner, issued a warrant to the said W. Frank Mathues, United States Marshal, for the removal of your relator, Thomas W. Cunningham, to the District of Columbia, there to stand trial, by virtue of which warrant the said W. Frank Mathues now has your Petitioner in custody and has deprived him of his lawful liberty.

WHEREFORE your Petitioner prays your Honorable Court that a writ of habeas corpus may issue, directed to the said W. Frank Mathues, United States Marshal, aforesaid, and to each and all of his deputies, requiring him and them to bring and have your Petitioner, together with a true cause of the detention of your Petitioner before this Court at the time by this Court determined to the end that due inquiry may be had in the premises and that the Court may proceed to determine the facts of this case in that regard and the legality of your Petitioner's imprisonment, restraint and detention and thereupon to dispose of this Petitioner as law and justice may require.

And your Petitioner will ever pray, etc.

(S) THOMAS W. CUNNINGHAM.

IN THE DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF PENNSYLVANIA } *ss:*

THOMAS W. CUNNINGHAM, being duly sworn according to law, deposes and says that he is the Petitioner in the foregoing Petition, and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

THOMAS W. CUNNINGHAM.

Sworn to and subscribed
before me this 10th day of
May A. D. 1928.

GEORGE BRODBECK,
Clerk, U. S. District Court E. D. of Pa.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS.

(Filed May 10, 1928.)

AND NOW, to wit: May 10, 1928, it is ORDERED that the above named relator be, and he is hereby, remanded into the custody of the United States Marshal for the Eastern District of Pennsylvania, and that the petition for the writ of habeas corpus be, and it is hereby, dismissed.

By the Court
(S) DICKINSON, *J.*

ASSIGNMENTS OF ERROR.
(Filed May 10, 1928.)

AND Now, to wit: this 10th day of May, A. D., 1928, comes Thomas W. Cunningham, the above named relator, and assigns the following errors in the proceedings, holding and judgment of the said District Court in this cause:

1. The Court erred in dismissing the petition for the writ of habeas corpus filed in the above case by the relator, by Decree filed May 10, 1928, as follows:

> "And Now, to wit: May 10, 1928, it is Ordered that the above named defendant be, and he is hereby, remanded into the custody of the United States Marshal for the Eastern District of Pennsylvania, and that the petition for the writ of habeas corpus be, and it is hereby, dismissed.
>
> By the Court
> Dickinson, J."

2. The Court erred in failing to order the discharge of the relator from custody, said decree being as follows: (Decree under assignment of error No. 1 incorporated herein by reference).

3. The Court erred in directing that a warrant of removal shall issue, said decree being as follows: (Decree under assignment of error No. 1 incorporated herein by reference).

4. The Court erred in directing the removal of your relator, Thomas W. Cunningham, said decree being as follows: (Decree under assignment of error No. 1 incorporated herein by reference).

(S) OTTO KRAUS, JR.,
" BENJAMIN M. GOLDER,
" RUBY R. VALE,
Attorneys for Relator.

PETITION FOR APPEAL WITH SUPERSEDEAS.
(Filed May 10, 1928.)

To the Honorable, the Judges of the said District Court:

The petition of Thomas W. Cunningham, the relator, respectfully represents:

That your petitioner is aggrieved by the judgment of the said District Court entered on the 10th day of May, 1928, dismissing your petitioner's petition for a writ of habeas corpus filed in the above proceedings, and directing the removal of your petitioner from the Eastern District of Pennsylvania to the District of Columbia.

That your petitioner prays for an appeal and that upon his giving bond in an amount to be fixed by this Court that said appeal may operate as a supersedeas, and that a transcript of the record and proceedings had before Hon. Oliver B. Dickinson, sitting as a United States Commissioner; and the record and proceedings before this Court in the Habeas Corpus proceedings and sur motion for a warrant of removal, as also the opinion, holdings and judgment herein rendered, all duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit, and that such other and proper proceedings may be had as may be proper in the premises, and your petitioner files herewith his Assignments of Error.

WHEREFORE, your petitioner, the said Thomas W. Cunningham, for the said errors assigned, and other reasons apparent on the face of the record, prays that the holdings and judgment of the District Court dismissing his petition for writ of habeas corpus filed in the above matter and directing his removal to the District of Columbia for trial be reversed, and that the judgment and order of the United States District

Court be set aside, and that there may be judgment granting your petitioner's application for a writ of habeas corpus and discharging him from custody.

(S) Otto Kraus, Jr.,
" Benjamin M. Golder,
" Ruby R. Vale,
Attorneys for Petitioner.

United States of America
Eastern District of Penna. } *ss:*

Thomas W. Cunningham being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition as the basis thereof are in all respects true.

(S) Thomas W. Cunningham.

Sworn to and subscribed
before me this 10th day of
May, A. D. 1928.
(S) George Brodbeck,
Clerk U. S. District Court E. D. of Pa.

ORDER ALLOWING APPEAL.
(Filed May 10, 1928.)

AND Now, to wit: this 10th day of May, A. D., 1928, it is ORDERED that an appeal be allowed as prayed for:

AND IT IS FURTHER ORDERED that said appeal act as a supersedeas staying the execution of the order or judgment and warrant of removal upon relator entering bond in the sum of $1,000.00.

By the Court
(S.) DICKINSON, *J.*

PRÆCIPE FOR TRANSCRIPT OF RECORD.
(Filed May 17, 1928.)

To the Clerk, U. S. District Court Eastern District of Penna.:

In making up the transcript of record sur appeal in the above case, you will include the following:

Docket Entries.
Affidavit for Warrant of Arrest.
Warrant of Arrest.
Certified Copy of Indictment.
Testimony before Senate Committee at Chicago, Ill.
Testimony before Senate Committee at Washington, D. C.
Opinion, Dickinson, J.
Petition for Writ of Habeas Corpus and remanding relator to custody.
Order dismissing Petition for Writ of Habeas Corpus.

Assignments of Error.
Petition for Appeal.
Order allowing Appeal.
Order allowing Supersedeas.
Præcipe for Transcript of Record.
Clerk's Certificate.

and no others.

BENJAMIN M. GOLDER,
Attorney for Relator.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNA., } *ss.:*

I, GEORGE BRODBECK, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of so much of the pleas and proceedings; in the case of United States of America ex rel. Thomas W. Cunningham vs. W. Frank Mathues, United States Marshal, No. M-140 March Term, 1928; as per præcipe filed, a copy of which is hereto attached, the transcript of record in the above entitled cause is to include, ——————————————— now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia this 27th day of July, A. D. 1928.

GEORGE BRODBECK,
Clerk.
By LEO A. LILLY.

(Seal)

TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS.

(Filed December 23, 1930.)

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

THOMAS W. CUNNINGHAM, being duly sworn according to law, and on his oath, traverses the return to writ of habeas corpus filed by Walter C. Fetters, in the above case, in manner following:

1. Paragraph 1 admitted.

2. Deponent admits the record facts as alleged in paragraph 2 but avers that his detention is illegal and incorporates herein by reference the allegations contained in paragraphs 4 and 5 of his petition for habeas corpus.

3. Paragraph 3 admitted.

4. Paragraph 4 denied. Deponent incorporates herein by reference the allegations contained in paragraphs 4 and 5 of his petition for writ of habeas corpus.

5. Paragraph 5 denied. Deponent incorporates herein by reference the allegations contained in paragraphs 4 and 5 of his petition for a writ of habeas corpus.

WHEREFORE deponent prays that he be forthwith discharged.

(Sgd.) THOMAS W. CUNNINGHAM.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

THOMAS W. CUNNINGHAM, being duly sworn according to law, deposes and says that he read and signed the foregoing traverse to return to writ of habeas corpus and that the facts herein contained are true.

(Sgd.) THOMAS W. CUNNINGHAM.

Sworn to and subscribed before me this twenty-third day of December, A. D. 1930.

(Sgd.) GEORGE BRODBECK,
Clerk U. S. District Court E. D. of Pa.

STIPULATION OF COUNSEL.

(Filed December 23, 1930.)

AND NOW, December 23, 1930, it is stipulated and agreed between counsel for both parties that the hearing in the above entitled habeas corpus proceeding shall be determined upon the petition, the writ, the return of the respondent to the writ, and traverse to the return, including the former habeas corpus proceeding brought by the relator against W. Frank Mathues, United States Marshal, to No. 140 M of 1928, which appears in "Exhibit B" annexed to and made a part of the return of the respondent to the writ of habeas corpus issued herein.

(Sgd.) BENJ. M. GOLDER,
(Sgd.) OTTO KRAUS, JR.,
For Relator.

(Sgd.) HOWARD BENTON LEWIS,
For the Respondent.

OPINION

Sur Hearing on Habeas Corpus, on Petition, Return, Traverse and Proofs.

(Filed December 23, 1930.)

DICKINSON, *J.*

There is danger that the final disposition of this cause may be delayed and its merits lost in a maze of procedural questions. A recapitulation may make clear the present record situation. The main question to be determined in this cause had been fully discussed in the closely akin case of

U. S. v. Barry, 25 (2d) Fed. Rep., 733.

The view taken of the first case had made the disposition of the second by this Court almost perfunctory. To expedite a ruling it was arranged that a warrant be applied for and issued and hearing given the defendant by a Judge of this Court, sitting as a Committing Magistrate, and the defendant discharged or held for trial as the Judge might decide; if the defendant was held, a motion for a warrant of removal of the defendant to the District Court of the District of Columbia should be made and issued or refused by a Judge of this Court; if the warrant issued, the defendant should be taken into custody by the Marshal and should thereupon petition for a writ of Habeas Corpus to have the lawfulness of his detention determined, the relator being enlarged upon bail pending the ruling in the Habeas Corpus proceeding. The cause was heard upon a Habeas Corpus hearing on Petition, Return, Traverse and Proofs. The only or main evidence upon which the defendant could be held was an indictment found in the District of Columbia District, charging the offense of a refusal to answer pertinent questions propounded by a Committee of the Senate

of the United States. The defendant in the main contended that the questions set forth in the indictment were not pertinent and hence that no legal offense was charged. If this contention had been upheld, the relator had the right to his discharge on Habeas Corpus, because clearly no defendant should be sent into another District for trial when the act with the commission of which he was charged constituted no crime under the law. This Court, however, held to the view that the question raised was a question to be determined by the trial Court and not by the Habeas Corpus Court.

U. S. ex rel. v. Mathues, 26 (2d) Fed. Rep., 272.,

The relator was accordingly remanded to the custody of the Marshal for removal. He thereupon exercised his right of appeal to the Circuit Court of Appeals of the Third Circuit, by which Court the judgment of this Court was reversed.

U. S. ex rel. v. Mathues, 33 (2d) Fed. Rep., 261.

Application for a certiorari was then made to the Supreme Court, before the hearing of which the Marshal of this District, who was the defendant in the Habeas Corpus proceeding, went out of office, and was succeeded by the present Marshal. No substitution of the new Marshal having been made within the time prescribed by the Act of Congress, the proceeding was, on suggestion of this fact, held to have abated, and a mandate was sent down to this Court directing us to abate the writ before issued. This has accordingly been done. The defendant in the prosecution and the writ of removal has surrendered himself to the Marshal in relief of his bail and is now in the custody of the Marshal. He has thereupon petitioned this Court for

a writ of Habeas Corpus, complaining of his detention under the original warrant of arrest and his commitment. The writ was allowed and the Marshal has made return that the relator is in his custody under the warrant of removal. The hearing on the Habeas Corpus was agreed should be determined upon the evidence taken at the former hearing, which, by stipulation, is made the evidence in the present proceeding.

DISCUSSION.

The relator attaches importance to the distinction indicated between detention under the warrant of removal and the commitment. We do not see that it has any. The relator is found to be in fact held by the Marshal by authority of the original warrant of arrest, the commitment and the warrant of removal, each and all. The only question to be determined by this Court is whether we are at liberty to adhere to the judgment before reached that the relator should be remanded, or whether we are bound to accept and to follow the ruling of the Circuit Court of Appeals that he should be discharged without day.

In view of the almost certainty that this cause will have an appellate experience, the disposition we make of it is barely more than formal. The sole effect of it is to put on one party or the other the burden of appeal and hence the expense of printing the larger Paper Book. The only question is what is for this Court the law of the case? It seems clear that it is what the Circuit Court of Appeals has declared it to be.

U. S. ex rel. Cunningham v. Mathues, 33 (2d) F. R. 261.

The following of the ruling of the Circuit Court of Appeals calls for an order discharging the relator without day, and a formal order to this effect may be submitted.

ORDER DISCHARGING RELATOR.

(Filed December 23, 1930.)

AND NOW, to wit: December 23, 1930, *sur* hearing on habeas corpus, on petition, writ, return of the respondent to the writ, traverse and proofs, it is hereby ORDERED, ADJUDGED, and DECREED that THOMAS W. CUNNINGHAM, the above-named relator, be, and he is hereby DISCHARGED from the custody of the United States Marshal for the Eastern District of Pennsylvania, without day, upon the relator entering into his own recognizance in the sum of $1000, without surety in accordance with clause 3 of Rule 31 of the Circuit Court of Appeals for the Third Circuit.

By THE COURT,
(Sgd.) DICKINSON, *J.*

Exception to the above order was asked for by respondent but refused, because the order is not the subject of exception.

(Sgd.) O. B. DICKINSON, *J.*

BAIL BOND.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, }

I, THOMAS W. CUNNINGHAM, residing at 2116 Cherry Street, Philadelphia, Pennsylvania, acknowledge myself to be jointly and severally indebted to the United States of America in the sum of one thousand ($1000) dollars, lawful money of the United States of America, to be levied of my goods and chattels, lands and tenements, upon this condition:

That if the said THOMAS W. CUNNINGHAM, the relator, shall be and appear at the District Court of the United States for the Eastern District of Pennsylvania upon the determination of the proceedings of the appeal of WALTER C. FETTERS, U. S. Marshal for the Eastern District of Pennsylvania, the respondent, to the Circuit Court of Appeals for the Third Circuit, and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the said Court of Appeals, or the Supreme Court of the United States, or, within five days thereafter, to answer and obey whatever final order or judgment, except as to costs, shall be made in the premises, and not depart said Court without leave thereof, then this recognizance to be void; otherwise, to remain in full force and virtue.

IN THE EVENT OF THE FOREGOING RECOGNIZANCE being forfeited, I do hereby empower the United States Attorney for the Eastern District of Pennsylvania, or any of his assistants, to appear for me, and with or without declaration or statement filed for the above penalty, thereupon, to confess judgment or judgments against me, for the said principal sum and costs as of any session of the District Court of the United States for the Eastern District of Pennsylvania; stay of execution and inquisition and extension upon any levy on real estate is hereby waived and condemnation agreed to, and the exemption of personal property from levy and sale on any execution hereon is also hereby expressly waived and no benefit of exemption shall be claimed under and by virtue of any exemption law now in force or which may be hereafter passed; and for so doing, this shall be sufficient warrant. A copy of this bond and warrant being filed in said action, it shall not be necessary to file the original as a warrant of attorney, any law or rule of Court to the contrary notwithstanding.

THOMAS W. CUNNINGHAM. (Seal)

Taken, acknowledged and subscribed to before me this twenty-third day of December, 1930.

GILBERT W. LUDWIG,
Deputy Clerk, U. S. D. C.

PETITION FOR APPEAL.

(Filed December 23, 1930.)

To the Honorable the Judges of the District Court:

The petition of the above-named Walter C. Fetters, United States Marshal for the Eastern District of Pennsylvania, respectfully represents:

That your petitioner is aggrieved by the order or judgment of the said District Court entered on the twenty-third day of December, 1930, sustaining the writ of habeas corpus in the above proceeding and discharging Thomas W. Cunningham, the above-named relator, from the custody of the United States Marshal for the Eastern District of Pennsylvania without day.

That your petitioner prays that an appeal to the United States Circuit Court of Appeals for the Third Circuit from the said order and judgment be allowed him and that a transcript of the record of the proceedings and papers on which said order and judgment were made, all duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit, and that such other and further proceedings may be had as may be proper in the premises, and your petitioner files herewith his assignments of error.

For the United States Attorney for the Eastern District of Pennsylvania:

(Sgd.) HOWARD BENTON LEWIS,
Assistant United States Attorney.

ORDER ALLOWING APPEAL.

(Filed December 23, 1930.)

Now, to wit, this twenty-third day of December, 1930, it is ordered that an appeal be allowed as prayed for and that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Third Circuit.

By THE COURT,

(Sgd.) DICKINSON, *J.*

ASSIGNMENTS OF ERROR.

(Filed December 23, 1930.)

AND Now, to wit: this twenty-third day of December, 1930, comes Walter C. Fetters, United States Marshal for the Eastern District of Pennsylvania, the above-named respondent, and assigns the following errors in the proceedings, orders, holdings and judgment of the said District Court in the above-entitled cause.

1. The Court erred in sustaining the writ of habeas corpus in the above case and in ordering that the relator, Thomas W. Cunningham, be discharged from the custody of the United States Marshal for the Eastern District of Pennsylvania, without day, as follows:

> "AND Now, to wit: December 23, 1930, sur hearing on Habeas Corpus, on Petition, Writ, Return of the respondent to the Writ, Traverse and Proofs, it is hereby Ordered, Adjudged and Decreed that Thomas W. Cunningham, the above-named relator, be, and he is hereby discharged

from the custody of the United States Marshal for the Eastern District of Pennsylvania, without day, upon the relator entering into his own recognizance in the sum of $1,000, without surety in accordance with Clause 3 of Rule 31 of the Circuit Court of Appeals for the Third Circuit.

"By THE COURT,
"(Sgd.) DICKINSON, *J.*

"Exception to the above order was asked for by respondent but refused, because the order is not the subject of exception.

"(Sgd.) O. B. DICKINSON, *J.*"

2. The Court erred in not discharging the writ of habeas corpus and in not remanding the relator into the custody of the United States Marshal for the Eastern District of Pennsylvania, to be removed by the said Marshal to the District of Columbia in order that he may be dealt with according to law.

For the United States Attorney for the Eastern District of Pennsylvania:

(Sgd.) HOWARD BENTON LEWIS,
Assistant United States Attorney.

NOTICE OF APPEAL.

To the Clerk, United States Circuit Court of Appeals, Third Circuit, Philadelphia, Pennsylvania:

Please be advised that upon motion of counsel for defendant in the above-entitled cause, the Court (Dickinson, *J.*), has allowed an appeal to the United States Circuit Court of Appeals, Third Circuit, Philadelphia, Pennsylvania.

GEORGE BRODBECK,
Clerk.

By (Sgd.) E. G. JOHNSON,
Deputy Clerk.

HOWARD B. LEWIS, ESQ.,
PAUL FREEMAN, ESQ.,
For Appellant.

BENJAMIN M. GOLDER, ESQ.,
For Appellee.

CITATION.

UNITED STATES OF AMERICA, *ss.*:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
To United States of America, ex rel. Thomas W. Cunningham,

GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to a petition for appeal and order allowing same, filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein Walter C. Fetters, United States Marshal, is appellant and you are appellee to show cause, if any there be, why the judgment rendered against the said appellant as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf

WITNESS, the HONORABLE OLIVER B. DICKINSON, Judge of the District Court of the United
(Seal) States, this twenty-sixth day of December, in the year of our Lord one thousand nine hundred and thirty.

(Sgd.) O. B. DICKINSON,
Judge United States District Court
Eastern District of Pennsylvania.

Service acepted.

(Sgd.) BENJ. M. GOLDER,
Attorney for Appellee.

DOCKET ENTRIES.

United States of America
v.
Thomas W. Cunningham.

Commissioners' Return, No. 113 of 1928.

May 1, 1928.	Affidavit filed.
May 1, 1928.	Warrant of Arrest filed.
May 4, 1928.	Hearing before Dickinson, J., sitting as a U. S. Commissioner.
May 9, 1928.	Opinion, Dickinson, J., directing Warrant of Removal, etc., filed.
May 10, 1928.	Warrant of Removal Exit.
May 10, 1928.	Copy of Indictment in Supreme Court of District of Columbia filed.
May 17, 1928.	Testimony filed.
Dec. 23, 1930.	The defendant comes into Court and surrenders himself to the United States Marshal.

WARRANT OF REMOVAL.

(Filed May 10, 1928.)

THE UNITED STATES OF AMERICA, } No. 113 of 1928.
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.:*

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
To the Marshal of the Eastern District of Pennsylvania,
GREETINGS:

WHEREAS, Thomas W. Cunningham has been brought before me upon a commitment made by me, a District Judge sitting as a committing magistrate for the purpose of obtaining a warrant for the removal of the said Thomas W. Cunningham to the District of Columbia in which district the offense for which said prisoner has been so committed is to be tried, the copy of which commitment returned by the United States Marshal, as also all other proceedings, are hereto annexed;

AND WHEREAS, the United States District Attorney for the Eastern District of Pennsylvania has made application to me, under the provisions of the statutes of the United States in the behalf provided, for a warrant for the removal of the said prisoner to the said District of Columbia and an examination into the matter having been made by me;

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the PRESIDENT OF THE UNITED STATES OF AMERICA, to remove the said prisoner now in your custody forthwith to the said District of Columbia and there deliver him to the Marshal of the said District of Columbia or some other proper officer authorized to receive the said prisoner, in order that he may be dealt with according to law, and make return what you shall

have done, together with this writ, to the Clerk of the Supreme Court of the District of Columbia.

GIVEN under my hand and the seal of the District Court of the United States for the Eastern District of Pennsylvania, at the (Seal) City of Philadelphia, this tenth day of May, A. D. 1928, and in the One hundred and fifty-second year of the Independence of the United States.

(Sgd.) OLIVER B. DICKINSON,
Judge of the District Court.

Attest:

(Sgd.) GEORGE BRODBECK,
Clerk District Court.

TESTIMONY AT NEW HABEAS CORPUS HEARING.

(December 23, 1930.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

United States of America, ex rel. Thomas W. Cunningham

v.

Walter C. Fetters, United States Marshal.

Before HON. OLIVER B. DICKINSON, *J.*

Philadelphia, Pa., Tuesday, December 23, 1930, at 11 o'clock A. M.

Present: HOWARD BENTON LEWIS, ESQ., Assistant United States Attorney, for the Government;
BENJAMIN M. GOLDER, ESQ., for the relator.

THE COURT: You are now asking for a writ of habeas corpus?

MR. GOLDER: Yes, sir. The answer and the traverse are both ready to be filed, sir, today.

THE COURT: This is a petition for a writ?

MR. GOLDER: Yes, sir.

THE COURT: I will allow the writ.

MR. GOLDER: If the Court please, we have taken the liberty to put the order on the outside of the petition,

so that it will be returnable forthwith. Mr. Lewis has the answer.

THE COURT: Writ allowed, returnable forthwith.

MR. GOLDER: We put today's date in, which is December 23d.

THE COURT: Now, you have your writ of habeas corpus allowed.

MR. GOLDER: Yes, sir.

THE COURT: Your return, have you your return?

MR. LEWIS: May we delay until we get the writ, sir? I have the return ready. The Marshal, having accepted service of the writ and acknowledged service, I now submit a return to the writ of habeas corpus.

MR. GOLDER: We filed a traverse, your Honor.

MR. LEWIS: The Government submits a stipulation between counsel that the hearing shall be determined upon the petition, writ, return of the respondent to the writ, and traverse to the return, including the former habeas corpus proceedings brought by the relator against W. Frank Mathues, United States Marshal, to No. 140-M of 1928. It appears in Exhibit "B" annexed to and made a part of the return of the respondent to the writ of habeas corpus issued herein.

THE COURT: All right. Then, you are ripe for a ruling?

MR. GOLDER: Yes, sir.

THE COURT: Then, you can hand in your order discharging the relator from custody without day.

MR. LEWIS: The Government hands in an order discharging the relator from custody without day.

May I now file, sir, petition for appeal?

THE COURT: You may, if you like. I assume that you are willing to be discharged?

MR. GOLDER: Yes, sir.

MR. LEWIS: The Government files petition for appeal, together with assignments of error.

THE COURT: Bill filed contemporaneously with this decree and opinion.

MR. LEWIS: The Government offers an order allowing the appeal, if the Court please.

THE COURT: All right. I will allow the appeal. Do you want him admitted to bail?

MR. LEWIS: Yes; I have an order allowing bail, if the Court please.

THE COURT: What do you mean by that?

MR. LEWIS: I mean, sir, that under the rule of the Circuit Court, the relator, when discharged under the writ, is required, pending appeal, to execute a recognizance before the clerk of the District Court, with surety, conditioned upon his appearance at the District Court to answer the judgment of the United States Circuit Court of Appeals.

THE COURT: No; I do not think you have that right.

MR. LEWIS: Your Honor will find that in the rules of the Court.

THE COURT: No; I do not think that is quite the rule. Now, I think that the proper practice is——

MR. LEWIS: 224 Federal.

THE COURT: —that we admit the relator to bail pending the ruling of this Court; then discharge him. Now, that relieves the bail; you take your appeal. If

your appeal is sustained, then the order of this Court, discharging him, goes for nothing; but how can we admit a man to bail after we discharge him?

MR. LEWIS: All right.

THE COURT: Mr. Golder, I assume that there is no objection to this relator under bail pending the ruling of this Court on his petition for a habeas corpus?

MR. GOLDER: No, sir.

THE COURT: Well——

MR. GOLDER: I understood from Mr. Kraus, who discussed the matter with Mr. Lewis, that the rule of the Circuit Court is to the effect that bail should be entered. I didn't look it up, and I don't know, your Honor.

MR. LEWIS: Rule 31, sir.

MR. GOLDER: I don't see the logic of it.

THE COURT: I do not see how, in the world, I can discharge him and then hold him for bail.

MR. GOLDER: May I ask that the sheriff be allowed to sign his own bond?

THE COURT: I will make an order discharging him. Where is the order?

MR. LEWIS: Here is the order allowing bail.

THE COURT: I know, but where is the order discharging him?

MR. LEWIS: I handed that up to your Honor.

THE COURT: I think that he ought to be discharged under Section 3.

MR. LEWIS: I think not, sir. We take an appeal after you have discharged him.

THE COURT: What control have I over him after I have discharged him?

MR. LEWIS: But we take an appeal immediately.

THE COURT: I do not care whether you do or do not, but under this rule, as I interpret this rule, I ought not to discharge him absolutely, but I ought to discharge him so that he will give a recognizance. (Reading.)

MR. LEWIS: Yes, sir; I have since taken an appeal.

THE COURT: Before he is discharged, he enters into that recognizance; isn't that right? That looks to me perfectly consistent and perfectly clear, but for me to hold him without bail, after I discharge him——

MR. GOLDER: May I ask your Honor that the Sheriff be permitted to enter bail without surety?

THE COURT: What rule is it?

MR. LEWIS: The Circuit Court of Appeals for the Third District, Rule 31.

THE COURT: Rule 31. I have conditioned this upon the relator entering into his own recognizance, without surety, in accordance with Clause 3 of Rule 31 of the Circuit Court of Appeals for the Third District.

MR. LEWIS: Will your Honor, also, sign my order for bail on appeal, that I handed up?

THE COURT: Well, I don't think I have anything to do with that. The Circuit Court of Appeals does that. You say, "with surety"?

MR. LEWIS: No; "without surety." You can strike that out, sir, if you will.

THE COURT: I don't see any occasion for that. I will mark it "$1,000." Now, I have required him to enter into that recognizance before he is released from

the custody of the Marshal. I think that holds him. If you think this other is required, you will have to go to the Circuit Court of Appeals, because I think it is not for me to say under what condition they will hear the appeal.

MR. LEWIS: Of course, sir, I have entitled it in this District Court of the United States.

THE COURT: I know you have, and I understand your point, but it seems to me——

MR. LEWIS: You see, sir, when you discharge this relator from custody today, I had not yet taken an appeal.

THE COURT: I understand that, but I have released him upon the condition that he enter into bail, that pending an appeal he will hold himself subject to the orders of the Appellate Court, and I do not see why that does not hold him, and I do not see where I have authority to do anything more. If the Circuit Court of Appeals feels that the provision that I have made for his further custody is not sufficient, I think they can order him to give such bail, pending the appeal, as they see fit.

MR. LEWIS: You see, this bail is for his appearance before you?

THE COURT: Which bail?

MR. LEWIS: This bail on appeal.

THE COURT: But I have required him to give bail as called for by this rule, which is for his appearance to answer the judgment of the Appellate Court.

MR. LEWIS: For his appearance before your Honor.

THE COURT: He gives that bail, and the bail is as the rule requires. If that phraseology is unhappily

chosen, I can say that I did not choose it, but what is the use of talking about it? I do not think that there is any practical danger that he will be wanting when his presence is required.

(Here ensued discussion off the record.)

THE COURT: I will enter a refusal to do that, on the ground that I have conditioned his discharge upon his giving that security and that there is no occasion for a second order upon that. If you want me to put that on the record for you, I will put it on the record for you.

MR. LEWIS: Just note an exception to that.

PRÆCIPE FOR TRANSCRIPT OF RECORD.

(Filed December 30, 1930.)

To the Clerk, United States District Court, Eastern District of Pennsylvania.

Sir:

In making up the transcript of record sur appeal in the above case, you will include the following:

Docket entries.
Petition for writ of habeas corpus.
Writ of habeas corpus.
Return to writ of habeas corpus.
Traverse to return to writ of habeas corpus.
Stipulation of counsel as to proofs of hearing.
Opinion, Dickinson, J.
Order discharging relator on entry of recognizance pending appeal.
Recognizance of relator pending appeal.
Petition for appeal.
Assignments of error.

Order allowing appeal.
Notification of appeal to clerk, U. S. Circuit Court of Appeals, Third Circuit.
Citation to relator as appellee to appear and show cause on said appeal.
Docket entries, Commissioner's Return No. 113 of 1928.
Warrant of removal.
Notes of testimony taken at habeas corpus hearing, December 23, 1930.
Præcipe for transcript of record.
Clerk's certificate.

and no others.

For the United States Attorney,
(Sgd.) HOWARD BENTON LEWIS,
Assistant United States Attorney.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNA., } *ss.:*

I, GEORGE BRODBECK, clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original so much of the pleas and proceedings; in the case of UNITED STATES OF AMERICA ex rel. THOMAS W. CUNNINGHAM v. WALTER C. FETTERS, United States Marshal for the Eastern District of Pennsylvania, No. M-274; as per præcipe filed, a copy of which is hereto attached, the transcript of record in the above-entitled cause is to include, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of
(Seal) the aforesaid Court at Philadelphia this seventh day of January, A. D. 1931.

(Sgd.) GEORGE BRODBECK,
Clerk.

126 United States of America, Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.

I, William P. Rowland, clerk of the United States Circuit Court of Appeals, for the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record in the case of: Walter C. Fetters, U. S. marshal, appellant vs. U. S. ex rel. Thomas W. Cunningham, appellee, No. 4543, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 2nd day of February, in the year of our Lord one thousand nine hundred and thirty-one and of the independence of the United States the one hundred and fifty-fifth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

37454—31

Supreme Court of the United States

Order allowing certiorari

Filed March 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

FEB 10 1
CHARLES ELMORE

No. 720

In the Supreme Court of the United States

OCTOBER TERM, 1930

WALTER C. FETTERS, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. —

WALTER C. FETTERS, UNITED STATES MARSHAL FOR the Eastern District of Pennsylvania, petitioner

v.

UNITED STATES OF AMERICA EX REL. THOMAS W. Cunningham

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of Walter C. Fetters, United States Marshal for the Eastern District of Pennsylvania, prays that a writ of certiorari issue to bring before this Court the cause between the above-entitled parties, which is now pending in the Circuit Court of Appeals for the Third Circuit, but which has not been submitted to, heard, or decided by that court.

QUESTION PRESENTED

Whether an indictment under Section 102 of the Revised Statutes charging the respondent with having, as a witness before a Committee of the Sen-

ate, refused to answer questions pertinent to the question under inquiry by the Committee, was sufficient evidence of probable cause to sustain an order for his removal for trial in proceedings under Section 1014 of the Revised Statutes.

STATEMENT

On April 20, 1928, the respondent was indicted in the Supreme Court of the District of Columbia upon the charge of having refused to answer certain pertinent questions in a hearing being conducted by a Senate Committee. The indictment set forth in detail the Senate resolutions under which the Committee functioned, and also set forth the questions which respondent refused to answer, alleging that they were pertinent to the inquiry being conducted by the Committee. (R. 9–28.) Later in 1928 the respondent was apprehended in Philadelphia under a warrant of arrest issued under Section 1014 of the Revised Statutes (*infra*, p. 8) by the United States District Judge sitting as a committing magistrate. (R. 40.) At the hearing the respondent's identity was admitted. (R. 42–43.) The Government introduced a certified copy of the indictment as evidence of probable cause, and then rested. (R. 43–63.)

The respondent challenged the sufficiency of the indictment, asserting in effect that it failed to show that the questions which the respondent refused to answer were pertinent to the Committee's inquiry, notwithstanding the fact that the indictment al-

leged that they were pertinent. The respondent also introduced a transcript of his testimony before the Senate Committee. (R. 67–87.) The respondent was ordered committed for removal, and the court issued a warrant directing his removal to the District of Columbia. (R. 115.) He then filed a petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania, alleging, in substance, that the indictment failed to show that the questions which he refused to answer "were pertinent questions in the inquiry then being made by the particular Committee of the United States Senate." (R. 93–95.) After a hearing, the petition was ordered dismissed (R. 96), the court holding that the indictment was sufficient to support a warrant of removal. (R. 33; *United States ex rel. Cunningham* v. *Mathues*, 26 F. (2d) 272.)

The relator then appealed to the Circuit Court of Appeals for the Third Circuit. That court, with one judge dissenting, reversed the judgment below on the ground that the indictment failed to charge a crime because the questions which the respondent refused to answer did not appear to be pertinent. *United States ex rel. Cunningham*, v. *Mathues*, 33 F. (2d) 261. On rehearing, the court adhered to its prior decision, in an opinion which has not been reported.[1] Thereupon a petition for

[1] This opinion appears at pp. 51–52 of the record filed in this Court in the case of *Mathues* v. *United States ex rel. Cunningham*, No. 451, October Term, 1930.

a writ of certiorari was filed in this Court on behalf of the United States Marshal. This Court, on October 27, 1930, granted a writ of certiorari and, on suggestion that the cause had abated because the Marshal had gone out of office, and no substitution had been made within the time provided by statute, ordered that the judgments of the Circuit Court of Appeals and of the District Court be vacated and the cause remanded to the District Court with directions to dismiss the proceedings as abated. *Mathues* v. *United States ex rel. Cunningham,* 282 U. S. iii.

On the abatement of the original *habeas corpus* proceedings in the District Court the respondent surrendered himself to the United States Marshal then in office. The respondent thereupon filed a new petition for a writ of *habeas corpus* which contained allegations similar to those made in the former petition. (R. 3–5.) A return to the writ was filed, setting out as an exhibit the record in the former *habeas corpus* proceedings. (R. 32, 37–101.) Although the return was traversed, it was stipulated by counsel that the hearing should be determined upon the petition and the return, including the former *habeas corpus* proceedings, made a part of the return. (R. 103.) After a hearing, the court ordered that the relator be discharged (R. 107), stating in its opinion (R. 104–106) that the law of the case had been determined by the opinion of the Circuit Court of Appeals in the former *habeas corpus* proceedings.

On December 23, 1930, an appeal to the Circuit Court of Appeals for the Third Circuit was allowed (R. 110), and on January 14, 1931, the case was docketed in the Circuit Court of Appeals. No further proceedings in that court have been had.

SPECIFICATION OF ERRORS

The District Court erred:

1. In directing that the respondent be discharged.

2. In holding that the indictment failed to charge an offense.

3. In holding that the indictment was not evidence of probable cause sufficient to sustain the commitment of the respondent for removal under Section 1014 of the Revised Statutes.

REASONS FOR GRANTING THE WRIT

1. The decision of the District Court followed the decision of the Circuit Court of Appeals in *United States ex rel. Cunningham* v. *Mathues,* 33 F. (2d) 261, which proceeding was abated in this Court because of the failure to substitute after the separation of the United States Marshal from his office. 282 U. S. iii. The decision is in apparent conflict with the following applicable decisions of this Court: *Henry* v. *Henkel,* 235 U. S. 219; *Benson* v. *Henkel,* 198 U. S. 1; *Hyde* v. *Shine,* 199 U. S. 62; *Rodman* v. *Pothier,* 264 U. S. 399; *Hughes* v. *Gault,* 271 U. S. 142.

2. Unless overruled by this Court, the decision of the Circuit Court of Appeals, followed by the Dis-

trict Court in this case, will stand as a precedent for the determination before removal of the defendant of issues triable only in the trial district and will thus tend to hinder, delay, and defeat the administration of justice.

Wherefore it is submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

FEBRUARY, 1931.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 104) has not yet been reported. No opinion has been rendered by the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals in *United States ex rel. Cunningham* v. *Mathues* is reported in 33 F. (2d) 261; its opinion on rehearing is not yet reported.[1] The opinion of the District Court in that case is reported in 26 F. (2d) 272.

JURISDICTION

The judgment of the District Court was entered on December 23, 1930. (R. 107.) Appeal to the Circuit Court of Appeals for the Third Circuit was allowed on December 23, 1930. (R. 110.) The case has not been heard or submitted in the Circuit Court of Appeals. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The statute upon which the indictment was founded is Section 102 of the Revised Statutes (U. S. C., Title 2, Sec. 192), which reads as follows:

> Every person who having been summoned as a witness by the authority of either House

[1] See note on p. 3, *supra*.

of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

Section 1014 of the Revised Statutes (U. S. C., Title 18, Sec. 591) provides as follows:

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other

than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The duties of commissioners of circuit courts, referred to in this section, were transferred to United States Commissioners by the Act of May 28, 1896, c. 252, Sec. 19, 29 Stat. 184.

ARGUMENT

The decision of the District Court in the instant case was made in obedience to the precedent established by the Circuit Court of Appeals for the Third Circuit in *United States ex rel. Cunningham* v. *Mathues*, 33 F. (2d) 261, and was based upon the record of the original removal proceedings which was before the Circuit Court of Appeals in the *Mathues case*. An appeal from the decision of the District Court has been taken to the Circuit Court of Appeals, and the Government now files this petition for certiorari "without the formality of awaiting the result" which is predetermined by the former decision of that court. *Lektophone Corporation* v. *Rola Co.*, 282 U. S. 168, 169.

The indictment in the instant case was founded on Section 102 of the Revised Statutes (*supra*, p. 8) which makes it an offense for any person summoned as a witness before a Committee of Congress willfully to refuse "to answer any question

pertinent to the question under inquiry." The indictment sets forth the questions which the respondent refused to answer at a hearing being conducted by a special Senate Committee investigating certain corrupt practices, and then definitely charges that the questions were pertinent to the inquiry being made by the Committee. (R. 9–28.) The Circuit Court of Appeals below determined that the pertinency of the questions was a matter for it to decide in its determination of the question whether the indictment constituted probable cause for the removal, and then held that the questions were not pertinent. In so doing we submit that the court below failed to observe the narrow limits of power which may be exercised either in removal proceedings or on *habeas corpus* to test the validity of an order of removal.

This Court has frequently determined that in removal proceedings or in a *habeas corpus* to test the validity of an order of removal the sufficiency of an indictment which is not palpably invalid is a question to be determined solely by the trial court. *Horner* v. *United States*, 143 U. S. 570, 577; *Benson* v. *Henkel*, 198 U. S. 1; *Hyde* v. *Shine*, 199 U. S. 62; *Henry* v. *Henkel*, 235 U. S. 219; *Rodman* v. *Pothier*, 264 U. S. 399; *Hughes* v. *Gault*, 271 U. S. 142. Under the rule established by these decisions the pertinency of the questions alleged in the indictment in the instant case should have been left for determination by the trial court in the District of Columbia.

The question of pertinency under Section 102 of the Revised Statutes has been likened to the question of materiality of false testimony charged as perjury. *Sinclair* v. *United States,* 279 U. S. 263, 298. Such questions are peculiarly for the consideration and determination of the trial court. In *Henry* v. *Henkel, supra,* the question of pertinency under Section 102 of the Revised Statutes was raised in an attempt to defeat removal, but this Court held that it was a question for the determination of the trial court and could not be determined in the removal proceeding. The other cases cited do not present the precise point here presented, but they disclose the controlling principles which this Court has applied in confining proceedings under Section 1014 of the Revised Statutes (*supra,* pp. 8-9) to the mere consideration of probable cause, excluding from the consideration of the committing magistrate with rare exceptions all questions regarding the sufficiency of the indictment or the jurisdicton of the trial court.

Furthermore, we believe that the pertinency of the questions clearly appears. Respondent introduced in the removal proceedings a transcript of his testimony before the Senate Committee. (R. 67-87.) This testimony was discussed in the opinion of this Court in *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 609, as follows:

> The questions here presented for determination grow out of an inquiry instituted by the United States Senate in respect of the

validity of the election of a United States Senator from Pennsylvania in November, 1926. The inquiry began before the election, immediately after the conclusion of the primaries, by the adoption of a resolution appointing a special committee to investigate expenditures, promises, etc., made to influence the nomination of any person as a candidate or promote the election of any person as a member of the Senate at the general election to be held in November, 1926.

After the Pennsylvania primaries, Cunningham was subpœnaed and appeared before this committee. Among other things, he testified that he was a member of an organization which supported William S. Vare for Senator at the primary election; that he had given to the chairman of the organization $50,000 in two instalments of $25,000 each prior to the holding of the primaries. He had been clerk of a court for 21 years and was then receiving a salary of $8,000 a year. He paid the money to the chairman in cash, but refused to say where he obtained it except that he had not drawn it from a bank. He would not say how long the money had been in his possession; said he had never inherited any, but declined to answer whether he had made money in speculation. In short, he declined to give any information in respect of the sources of the money, insisting that it was his own and the question where he had obtained it was a personal matter. He further said that he had

> learned the trick from a former senator of "saving money and putting it away and keeping it under cover"; that this senator "was a past master in not letting his right hand know what his left hand done, and he dealt absolutely in cash. The 'long green' was the issue."

The questions which were put to Cunningham, and which he declined to answer, were designed to test the accuracy of his story and to discover whether or not the funds he contributed were in fact moneys furnished by other persons. (R. 16–17, 19, 21, 23, 25, 27.) In the *Barry case, supra,* it was not necessary for this Court to determine the pertinency of the questions which the respondent refused to answer; but in commenting on his testimony, this Court said in that case (p. 619):

> Upon examination by the committee, he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him, but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

The Circuit Court of Appeals, both in *United States ex rel. Cunningham* v. *Mathues,* 33 F. (2d) 261, 263, and in the *Barry case* (29 F. (2d) 817, 821), held that the questions were not pertinent to the question under inquiry by the Committee, and

directed the respondent's discharge from custody in both cases. Apparently the court below failed to appreciate the necessity of testing the accuracy of the respondent's story. He had been clerk of a State court for twenty-one years, and at the time of his examination was receiving a salary of only $8,000 per year, and yet he testified that he contributed $50,000 in cash toward the expenses of a Senatorial campaign. (R. 68–73.) This story called for a most searching examination as to the source of this money, for the purpose of enabling the Committee to determine whether he was telling the truth or was acting for others in making the contribution. Consequently we believe that the court below erred in holding that the questions were not pertinent, if that question was before it for decision.

CONCLUSION

We submit that the decision below was erroneous, and that this petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

NUGENT DODDS,
CLAUDE R. BRANCH,
Special Assistants to the Attorney General.

HARRY S. RIDGELY,
ERWIN N. GRISWOLD,
Attorneys.

FEBRUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILED
MAR 25 1931
CHARLES ELMORE CROPLEY

FILE COPY

No. 720

In the Supreme Court of the United States

OCTOBER TERM, 1930

WALTER C. FETTERS, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 720

WALTER C. FETTERS, UNITED STATES MARSHAL FOR the Eastern District of Pennsylvania, petitioner

v.

UNITED STATES OF AMERICA EX REL. THOMAS W. Cunningham

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 104) has not yet been reported. No hearing has been held before the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals in *United States ex rel. Cunningham* v. *Mathues* is reported in 33 F. (2d) 261; its opinion on rehearing may be found at pp. 51–52 of the record filed in this Court in the case of *Mathues* v. *United*

States ex rel. Cunningham, No. 451, October Term, 1930. The opinion of the District Court in that case is reported in 26 F. (2d) 272.

JURISDICTION

The judgment of the District Court was entered on December 23, 1930. (R. 107.) Appeal to the Circuit Court of Appeals for the Third Circuit was allowed on December 23, 1930. (R. 110.) The case has not been heard or submitted in the Circuit Court of Appeals. The petition for certiorari was filed in this Court on February 10, 1931. Certiorari was granted March 2, 1931. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an indictment under Section 102 of the Revised Statutes charging the respondent with having, as a witness before a Committee of the Senate, refused to answer questions pertinent to the question under inquiry by the Committee, was sufficient evidence of probable cause to sustain an order for his removal for trial in proceedings under Section 1014 of the Revised Statutes.

STATUTES INVOLVED

The statute upon which the indictment was founded is Section 102 of the Revised Statutes (U. S. C., Title 2, Sec. 192), which reads as follows:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce

papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

Section 1014 of the Revised Statutes (U. S. C., Title 18, Sec. 591) provides as follows:

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness

is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The duties of commissioners of circuit courts, referred to in this section, were transferred to United States Commissioners by the Act of May 28, 1896, c. 252, Sec. 19, 29 Stat. 184.

STATEMENT

On April 20, 1928, the respondent was indicted in the Supreme Court of the District of Columbia upon the charge of having refused to answer certain pertinent questions in a hearing being conducted by a Committee of the United States Senate. The indictment set forth in detail the Senate resolutions under which the Committee functioned and also set forth the questions which respondent refused to answer, alleging that they were pertinent to the inquiry being conducted by the Committee. (R. 9–28.) Later in 1928 the respondent was apprehended in Philadelphia under a warrant of arrest issued under Section 1014 of the Revised Statutes (*supra*, p. 3) by the United States District Judge sitting as a committing magistrate. (R. 40.) At the hearing the respondent's identity was admitted. (R. 42–43.) The Government introduced a certified copy of the indictment as evidence of probable cause, and then rested. (R. 43–63.)

The respondent challenged the sufficiency of the indictment, asserting in effect that it failed to show that the questions which the respondent refused to

answer were pertinent to the Committee's inquiry, notwithstanding the fact that the indictment alleged that they were pertinent. The respondent also introduced a transcript of his testimony before the Senate Committee. (R. 67–87.) The respondent was ordered committed, and the court issued a warrant directing his removal to the District of Columbia. (R. 35–36.)

He then filed a petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania, alleging, in substance, that the indictment failed to show that the questions which he refused to answer "were pertinent questions in the inquiry then being made by the particular Committee of the United States Senate." (R. 93–95.) After a hearing the court on May 10, 1928, entered an order dismissing the petition (R. 96), holding that the indictment was sufficient to support a warrant of removal (R. 87; *United States ex rel. Cunningham* v. *Mathues*, 26 F. (2d) 272).

The relator then appealed to the Circuit Court of Appeals for the Third Circuit. On May 17, 1929, that court, with one judge dissenting, reversed the order below on the ground that the indictment failed to charge a crime because the questions which the respondent refused to answer did not appear to be pertinent. *United States ex rel. Cunningham* v. *Mathues*, 33 F. (2d) 261. A petition for rehearing was filed, which was held under advisement by the court until May 26, 1930, when a

rehearing was allowed. On June 13, 1930, after the rehearing, the court entered an order adhering to its former decision, with an opinion which has not been reported.[1] Thereupon a petition for a writ of certiorari was filed in this Court on behalf of the United States Marshal. This Court, on October 27, 1930, granted a writ of certiorari, but ordered that the proceedings be dismissed as abated because the Marshal had gone out of office and no substitution had been made within the time provided by statute. *Mathues* v. *United States ex rel. Cunningham*, 282 U. S. iii.

After the abatement of the original *habeas corpus* proceedings in the District Court the respondent surrendered himself to the United States Marshal then in office. The respondent thereupon filed a new petition for a writ of *habeas corpus* which contained allegations similar to those made in the former petition. (R. 3–5.) A return to the writ was filed setting out as an exhibit the record in the former *habeas corpus* proceedings. (R. 32, 37–101.) Although the return was traversed, it was stipulated by counsel that the matter should be determined upon the petition and the return, including the former *habeas corpus* proceedings, made a part of the return. (R. 103.) After a hearing, the court ordered that the respondent be discharged (R. 107), stating in its opinion (R. 104–

[1] This opinion appears at pp. 51–52 of the record filed in this Court in the case of *Mathues* v. *United States ex rel. Cunningham*, No. 451, October Term, 1930.

106) that the law of the case had been determined by the opinion of the Circuit Court of Appeals in the former *habeas corpus* proceedings.

On December 23, 1930, an appeal to the Circuit Court of Appeals for the Third Circuit was allowed (R. 110), and on January 14, 1931, the case was docketed in the Circuit Court of Appeals. No further proceedings in that court were had. A petition for certiorari was filed in this Court on February 10, 1931, and certiorari was granted on March 2, 1931.

SPECIFICATION OF ERRORS

The District Court erred—

1. In directing that the respondent be discharged.

2. In holding that the indictment failed to charge an offense.

3. In holding that the indictment was not evidence of probable cause sufficient to sustain the commitment of the respondent for removal under Section 1014 of the Revised Statutes.

SUMMARY OF ARGUMENT

This Court has frequently held that in removal proceedings or in *habeas corpus* proceedings to test the validity of an order of removal the sufficiency of an indictment which is not palpably invalid is a question to be determined solely by the trial court. If there is any defect in the indictment in the instant case it is not patent. Under the de-

cisions of this Court it is clear that the question of the validity of the indictment should be left to the trial court.

Even if the pertinency of the questions which the respondent refused to answer was a matter for determination by the court in removal proceedings, we submit that the questions were pertinent. The questions were designed to test the accuracy of his testimony before the committee and to discover the source of the funds which he contributed. In *Barry* v. *United States, ex rel. Cunningham*, 279 U. S. 597, 619, this Court had occasion to consider the same questions, and said that "it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election."

ARGUMENT

The indictment in the instant case is founded on Section 102 of the Revised Statutes (*supra*, p. 2), which makes it an offense for any person summoned as a witness before a committee of Congress willfully to refuse "to answer any question pertinent to the question under inquiry." The indictment sets forth the questions which the respondent refused to answer at a hearing conducted by a special Senate Committe investigating certain corrupt practices, and specifically charges that the questions were pertinent to the inquiry being made by the Committee. (R. 9–28.)

The Circuit Court of Appeals regarded the pertinency of the questions as a matter for it to decide in its determination of the question whether the indictment constituted probable cause for removal, and it held that the questions were not pertinent. In so doing, we submit that the court below failed to observe the narrow limits of power which may be exercised either in removal proceedings or on *habeas corpus* to test the validity of an order of removal.

I

THE PERTINENCY OF THE QUESTIONS WAS NOT PROPERLY A MATTER FOR DECISION IN THE REMOVAL PROCEEDINGS

The pertinency to the question under inquiry of the questions put to the respondent which he refused to answer was affirmatively alleged in the indictment. This issue tendered by the indictment could only be determined on the trial upon proofs disclosing the scope of the Committee's inquiry, the evidence adduced before it, and the bearing of the testimony sought to be elicited upon the investigation being pursued by the Committee. In such an investigation materiality must always depend upon the development and course of the investigation itself, unless it appear from an examination of the questions alleged to be irrelevant that they are so far removed from any possible relevancy to the inquiry authorized that no development in the course of such an investigation could conceivably render answers to such questions perti-

nent. Here the indictment alleged the resolutions under which the investigation was being conducted (R. 10–14), and it appeared that the questions put to the respondent were clearly within the general scope of the investigation authorized. Since the indictment itself alleged that the questions were pertinent to questions and matters under inquiry by the Committee no determination that the questions were not pertinent could be made except upon the proofs offered at the trial. The court below, however, in the face of allegations to the contrary, held as a matter of law that the questions were not pertinent to any question under inquiry before the Committee. We submit that not even the court in the trial District could make such a determination in advance of trial. But we contend that, even if the indictment had been open to attack on demurrer for failure to allege the pertinency of the questions which the respondent refused to answer, this would be a question which could only be determined under the decisions of this Court by the court in the trial district.

This Court has frequently held that in removal proceedings or in *habeas corpus* proceedings to test the validity of an order of removal the sufficiency of an indictment which is not palpably invalid is a question to be determined by the trial court. It is, of course, conceded that a document which purports to be an indictment may so plainly fail to charge any offense against the United States that it does not furnish a proper

basis for an order of removal. Thus, to put an extreme example, if an indictment charged a defendant with the offense of having red hair, the indictment would be palpably invalid, and, of course, would not constitute the probable cause necessary to support a warrant of removal. But if there is any defect in the indictment in the instant case, it is certainly not patent.

The case of *Henry* v. *Henkel*, 235 U. S. 219, is, we submit, controlling. In that case the defendant refused to answer certain questions put to him by a committee of Congress, and on account of his refusal he was indicted in the District of Columbia under Section 102 of the Revised Statutes. The defendant was arrested in New York and resisted removal. The Commissioner ordered the defendant to be held in custody, and the defendant thereupon applied to the District Judge for a writ of *habeas corpus*, contending (p. 226) that the resolution defining the scope of the inquiry "did not authorize an inquiry as to the matter about which [he] refused to testify." The District Judge discharged the writ, and on appeal this Court affirmed the judgment, holding that the questions raised were for the sole consideration of the court in the trial district.

In *Rodman* v. *Pothier*, 264 U. S. 399, a defendant resisted removal on account of an alleged lack of jurisdiction of the trial court over the place where the offense was committed. This Court held that

an order for removal was properly issued, saying (p. 402):

> Whether the *locus* of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law. As heretofore often pointed out, these matters must be determined by the court where the indictment was found. The regular course may not be anticipated by alleging want of jurisdiction and demanding a ruling thereon in a *habeas corpus* proceeding.

That the duty of the committing magistrate does not extend to the determination of the validity of the indictment, except in extreme cases, and that the power of the court in *habeas corpus* is no greater, is plainly indicated by the decision in *United States ex rel. Hughes* v. *Gault*, 271 U. S. 142. There this Court pointed out that under Section 1014 of the Revised Statutes power to commit for removal (p. 150) "is entrusted not only to judges and commissioners of the United States, and judges of state courts, but to any 'mayor of a city, justice of the peace, or other magistrate, of any State where he may be found.'" This Court said (p. 150):

> Obviously, in order to make it the duty of the judge to issue the warrant a mayor or a magistrate not a lawyer can not be expected to do more than to decide in a summary way that the indictment is intended

> to charge an offense against the laws of the United States, that the person before him is the person charged and that there is probable cause to believe him guilty, without the magistrate's being held to more than avoiding palpable injustice. * * * The rule that would apply to a mayor applies to a commissioner of the United States.

Numerous other decisions apply the controlling principles which this Court has enunciated in confining proceedings under Section 1014 of the Revised Statutes (*supra*, p. 3) to the mere consideration of probable cause, excluding from the consideration of the committing magistrate, with rare exceptions, all questions regarding the sufficiency of the indictment or jurisdiction of the trial court. *Horner* v. *United States*, 143 U. S. 570, 577; *Benson* v. *Henkel*, 198 U. S. 1; *Hyde* v. *Shine*, 199 U. S. 62; *Rumely* v. *McCarthy*, 250 U. S. 283; *Gayon* v. *McCarthy*, 252 U. S. 171; *Morse* v. *United States*, 267 U. S. 80.[2]

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[2] In *Parker* v. *United States*, 3 F. (2d) 903, 904 (C. C. A. 9th), certiorari denied, 268 U. S. 694, the rule was stated in the following language:

"If the indictment were clearly defective, we would not hesitate to discharge the appellant; but no such case is presented here. Without going into the objections in detail, the most that can be said is that they present debatable questions, and it is well settled that all disputed questions of fact and all disputed matters of law, relating either to the sufficiency of the indictment or to the validity of the statute on which the indictment is based, are for the determination of the court in which the indictment was returned."

The question of pertinency under Section 102 of the Revised Statutes has been likened to the question of materiality of false testimony charged as perjury. *Sinclair* v. *United States*, 279 U. S. 263, 298. Such questions are peculiarly for the consideration and determination of the trial court.

II

THE QUESTIONS WHICH THE RESPONDENT REFUSED TO ANSWER WERE PERTINENT

Even if the pertinency of the questions which the respondent refused to answer was a matter for determination by the court in removal proceedings, we submit that it clearly appears that the questions were pertinent. For the convenience of the Court, the questions upon which the indictment is based are set forth in the Appendix (*infra*, pp. 17–21). The general scope of the Committee's investigation is defined in the Senate Resolutions which are set forth in the indictment. (R. 10–14.)

The respondent introduced in the removal proceedings a transcript of his testimony before the Senate Committee. (R. 67–87.) Of this very testimony this Court in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 609, said:

> The questions here presented for determination grow out of an inquiry instituted by the United States Senate in respect of the validity of the election of a United States

Senator from Pennsylvania in November, immediately after the conclusion of the primaries, by the adoption of a resolution appointing a special committee to investigate expenditures, promises, etc., made to influence the nomination of any person as a candidate or promote the election of any person as a member of the Senate at the general election to be held in November, 1926.

After the Pennsylvania primaries Cunningham was subpœnaed and appeared before this committee. Among other things, he testified that he was a member of an organization which supported William S. Vare for Senator at the primary election; that he had given to the chairman of the organization $50,000 in two instalments of $25,000 each prior to the holding of the primaries. He had been clerk of a court for 21 years and was then receiving a salary of $8,000 a year. He paid the money to the chairman in cash, but refused to say where he obtained it except that he had not drawn it from a bank. He would not say how long the money had been in his possession; said he had never inherited any, but declined to answer whether he had made money in speculation. In short, he declined to give any information in respect of the sources of the money, insisting that it was his own and the question where he had obtained it was a personal matter. He further said that he had learned the trick from a former sena-

tor of "saving money and putting it away and keeping it under cover"; that this senator "was a past master in not letting his right hand know what his left hand done, and he dealt absolutely in cash. The 'long green' was the issue."

The questions which were put to Cunningham, and which he declined to answer, were designed to test the veracity of his testimony and to discover whether or not the funds he contributed were furnished by other persons. (R. 16–17, 19, 21, 23, 25, 27.) The Circuit Court of Appeals, both in *United States ex rel. Cunningham* v. *Mathues*, 33 F. (2d) 261, 263, and in the *Barry case* (29 F. (2d) 817, 821), held that the questions were not pertinent to the question under inquiry by the Committee, and directed the respondent's discharge from custody in both cases. Apparently that court failed to appreciate the necessity of testing the respondent's veracity. He had been clerk of a State court for twenty-one years, and at the time of his examination was receiving a salary of only $8,000 per year, and yet he testified that he contributed $50,000 in cash toward the expenses of a Senatorial campaign. (R. 68–73.) This story called for a most searching examination as to the source of this money, for the purpose of enabling the Committee to determine whether he was telling the truth or was acting for others in making the contribution.

In the *Barry case, supra,* it was not necessary for this Court to determine the pertinency of the questions which the respondent refused to answer; but in commenting on his testimony this Court said in that case (p. 619):

> Upon examination by the committee, he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him, but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

Consequently we believe that the court below erred in holding that the questions were not pertinent if that question was before it for decision.

The indictment in the instant case was returned in the District of Columbia on April 20, 1928. Nearly three years have been consumed in an effort to remove the respondent to the District of Columbia for trial. We believe that the record shows that resistance to removal has been unreasonably protracted, and that if the decision of this case is in favor of the petitioner, the mandate should issue forthwith. Such action was taken by this Court in the similar case of *Salinger* v. *Loisel,* 265 U. S. 224, 238.

CONCLUSION

We submit that the decision below was erroneous, and that the judgment of the District Court should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

ERWIN N. GRISWOLD,
Attorney.

MARCH, 1931.

APPENDIX.

QUESTIONS WHICH THE RESPONDENT REFUSED TO ANSWER, AS SET FORTH IN THE INDICTMENT

First Count (R. 16, 17):

The CHAIRMAN. Mr. Cunningham, the committee has called you before it the second time in order to permit you an opportunity to answer the questions you declined to answer before, and afford you the opportunity to answer such other questions as may be put to you. Mr. Cunningham, on your previous examination you stated (reading):

"I handed money to Thomas F. Watson—$25,000 on the 10th day of April, 1926."

Then this follows, as shown by the record of the proceedings (reading):

"The CHAIRMAN. Where did you get that money?

"Mr. CUNNINGHAM. I got that money out of my own private funds.

"The CHAIRMAN. How is that?

"Mr. CUNNINGHAM. Out of my own private funds.

"The CHAIRMAN. Your own private moneys?

"Mr. CUNNINGHAM. Yes, sir; my own money; my own money.

"The CHAIRMAN. How long had it been your own money?"

Mr. Golder at that time stated an objection, which appears in the record.

The question was repeated as follows (reading):

"The CHAIRMAN. How long had it been your own money?

"Mr. CUNNINGHAM. I refuse to answer that question, Senator, as a personal question. It is my own private business."

Second Count (R. 19):

The CHAIRMAN. Where did you get this $25,000 you say you gave Mr. Watson?

Mr. CUNNINGHAM. I refuse to answer that question, I think that is personal.

Third Count (R. 21):

The CHAIRMAN. Where were you keeping the $25,000 before you gave it to Mr. Watson?

Mr. CUNNINGHAM. That is another personal question, Senator. I refuse to answer it.

Fourth Count (R. 23):

The CHAIRMAN. Did you give this money to Mr. Watson in cash or by check?

Mr. CUNNINGHAM. I gave it to him as cash.

The CHAIRMAN. Where were you when you gave it to him?

Mr. CUNNINGHAM. I took it down to his headquarters at the Walton Hotel on the 10th day of April.

The CHAIRMAN. Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. CUNNINGHAM. Yes, sir.

The CHAIRMAN. Where did you get it from to put in your pocket?

Mr. CUNNINGHAM. That is a personal question, and I decline to answer it.

Fifth Count (R. 25):

The CHAIRMAN. Mr. Cunningham, how long had you had this money in your possession?

Mr. CUNNINGHAM. That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it.

Sixth Count (R. 27):

The CHAIRMAN. Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. CUNNINGHAM. That is another personal question. I can not answer that.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930. No. 720

WALTER C. FETTERS, United States Marshal for the Eastern District of Pennsylvania,
Petitioner,

vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM,
Respondent.

Respondent's Brief Against Allowance of Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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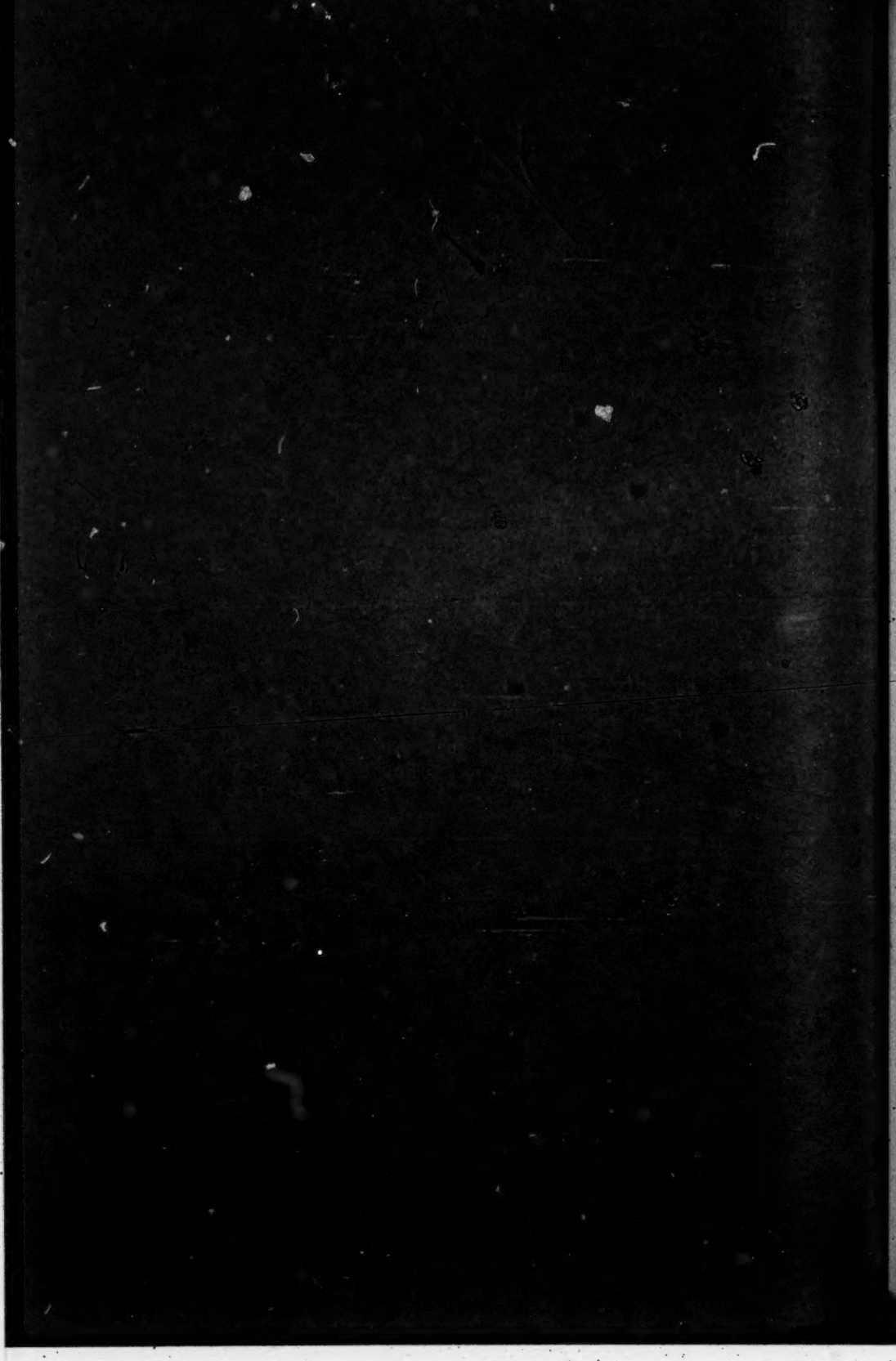

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IN THE

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Petitioner,

vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM,

Respondent.

RESPONDENT'S BRIEF AGAINST ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL STATEMENT.

The statement made in the petition should be supplemented by the essential facts stated in the opinion filed by Buffington, C. J., in the Circuit Court of Appeals in the former habeas corpus proceeding, which was made a part of the return in the instant proceedings (R. 103); since as concluded by Judge Dickinson in the District Court (R. 104, 106), that opinion determines the law of the case and made necessary respondent's discharge in the instant proceedings, which by him was ordered (R. 107). That opinion states (33 F (2d) 261):

"On May 18, 1926, a primary election was held in Pennsylvania and William S. Vare received the Republican nomination as a candidate for the United States Senate. At the general election held on November 2, 1926, he was elected United States Senator. Thereafter a petition was presented to the Senate contesting his election on the ground that fraudulent and unlawful practices were used in connection therewith.

On May 19, 1926, the Senate of the United States by resolution 195 created a committee of five members and authorized and instructed it,

'To investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall, hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto * * *

'The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee wilfully makes default, or

who, having appeared, refused to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by Section 102 of the Revised Statutes of the United States.

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

Pursuant to the resolution, the committee held a meeting at Washington in the District of Columbia, on February 21, 1927, at which the relator appeared in obedience to a summons of the committee but refused to answer certain questions asked by the committee on the ground that they related to his personal business and were not pertinent to the investigation authorized by the Senate.

The relator was thereafter on April 20, 1928, indicted by a grand jury in the Supreme Court of the District of Columbia, for refusing to answer the questions, which related to his contribution of $50,000 to Mr. Thomas F. Watson, chairman of the City Committee of Philadelphia, for use in the Primary election, in which William S. Vare was nominated.

The indictment contains six counts. The questions and answers follow:

FIRST COUNT.

"Mr. Cunningham: I handed money to Thomas F. Watson $25,000 on the 10th day of April, 1926.

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

Mr. Chairman: Your own private moneys:

Mr. Cunningham: Yes, sir; my own money, my own money.

The Chairman: How long had it been your own money?

Mr. Golder at that time stated an objection, which appears in the record.

The question was repeated as follows (reading):

The Chairman: How long had it been your own money?

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business."

SECOND COUNT.

"The Chairman: Where did you get this $25,000 you say you gave to Mr. Watson?

Mr. Cunningham: I refuse to answer that question, I think that is personal."

THIRD COUNT.

"The Chairman: Where were you keeping the $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it."

FOURTH COUNT.

"The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

Mr. Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it.

FIFTH COUNT.

"The Chairman: Mr. Cunningham, how long had you had this money in your possession?

Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it."

SIXTH COUNT.

"The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: That is another personal question. I cannot answer that."

On an affidavit of S. Busha, a warrant was issued and the relator was arrested and brought before Judge Dickinson who appears to have sat in three proceedings: 1. Committing magistrate, 2. Motion for warrant of removal, and 3. Hearing upon writ of habeas corpus.

As above stated, the writ or habeas corpus was dismissed, the warrant for removal was allowed and the relator was remanded to the custody of the United States Marshal for removal to the District of Columbia.

An appeal was taken and the question before us is

whether or not probable cause of the relator's guilt is sufficient to justify his removal for trial."

The Circuit Court of Appeals in an opinion by Buffington, C. J., with Davis, C. J., concurring and Woolley, C. J., dissenting, reversed Judge Dickinson's judgment on the ground that "prima facie evidence of probable cause which the indictment established is overcome by its own terms in failing to charge a crime," because the questions propounded were not pertinent (33 F (2d) 261).

After the decision of the Supreme Court of the United States in Barry vs. Cunningham (1929) 279 U. S. 597, a petition for reargument was filed, which averred that the decision of the Circuit Court of Appeals was at variance with the holdings of this Court in that case and the cases following:

Rodman vs. Pothier (1923), 264 U. S. 399;
Morse vs. United States (1924), 267 U. S. 83, and
Henry vs. Henkel (1914), 235 U. S. 219.

On rehearing, the Circuit Court of Appeals, in its opinion which is printed at the end of this book, marked Appendix "A", said:

> "We adhere to our previous opinion, and in doing so, we do not, in our view, disregard the holdings of the Supreme Court." The final judgment was then entered "with instructions to discharge the relator."

Petition for writ of certiorari and suggestion of abatement, because of failure to substitute, within the statutory period, the successor of the marshal who had gone out of office, were filed in this court; which on October 27th, 1930, granted the writ, vacated the judgments of the courts below and remanded the cause to the District Court with directions to dismiss the proceedings as abated. Mathues vs. United States Ex rel. Cunningham (1930), 282 U. S. 123.

Respondent surrendered himself to Fetters, the United States Marshal in office, filed his new petition for writ of habeas corpus (R. 3-5) to which a return was filed (R. 37-101) and traversed (R. 102).

It was stipulated by counsel that "the hearing * * * shall be determined upon the petition, the writ, the return * * * and traverse to the return, including the former habeas corpus proceeding."

Judge Dickinson concluded that "the law of the case * * * is what the Circuit Court of Appeals has declared it to be" U. S. ex rel. Cunningham vs. Mathues, 33 (2d) F. R. 261, on December 23rd, 1930, entered an order discharging the respondent (R. 107).

On the same date an appeal to the Circuit Court of Appeals (R. 110) was allowed and docketed as of March Term, 1931, No. 4543, with no further proceedings taken except the filing of the transcript of record therein.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

REMOVAL PROCEEDINGS—PROBABLE CAUSE—INDICTMENT PRIMA FACIE, NOT CONCLUSIVE—JURISDICTION OF REMANDING COURT—PERTINENCY.

(1)

On writ of habeas corpus in removal proceedings may the remanding court consider the indictment as prima facie but not conclusive evidence of the existence of a crime in its determination of the inquiry of probable cause, or has the court of trial exclusive jurisdiction to determine the existence of a crime.

(2)

Where all the proofs constituting the crime charged are contained in the indictment, may the prima facie evi-

dence of probable cause established by the indictment be overcome by its own counts if without doubt they do not charge a crime.

(3)

Are the questions propounded, which respondent's refusal to answer constitutes the crime charged under Section 102 R. S. "pertinent" to the investigation authorized by Senate Resolution 195 of the 69th Congress.

ARGUMENT.

Section 1014 of the Revised Statutes (U. S. C. Title 18, Sec. 591) makes the fact of probable cause of (1) the existence of a crime and (2) the guilt and (3) identity of the accused, the inquiry in removal proceedings.

The existence of a crime or the guilt of the accused prima facie may be established at the hearing of a petition for habeas corpus by introducing in evidence the indictment or by other proofs without the production of the indictment.

Distinction Between Indictment As A Pleading And As a Fact Evidential Of Probable Cause.

The distinction is clear between an indictment as a pleading in a criminal case and as a fact evidential of probable cause under a habeas corpus in removal proceedings.

The thread of differentiation announced by this court in Pierce vs. Creecy (1907) 210 U. S. 397, and repeated and applied in Rodman vs. Pothier (1923), 264 U. S. 399; Henry vs. Henkel (1914), 235 U. S. 219 and Morse vs. United States (1924), 267 U. S. 83, and which runs through all the reported cases considered by either the District Courts or the Circuit Courts of Appeal of the United

States, is that in removal proceedings the court of asylum will not pass upon the sufficiency of the indictment as a formal pleading, but may consider the indictment as a fact with other facts in the proofs as evidential of the existence of a crime in its determination of the controlling inquiry of probable cause. The reason for this is evident, for unless the trial court is given plenary jurisdiction to determine the sufficiency of its pleadings, e. g. the indictment, the writ of habeas corpus could be made the substitute for a writ of error; and unless the remanding court may weigh the offense as charged in the indictment with all the other proofs, all the facts evidential of probable cause, or its lack, will not have been considered, and the most essential or persuasive consideration in reaching a conclusion will have been ignored, viz., *the existence of a crime.*

In the instant proceedings the sufficiency of the indictment is not challenged as a formal pleading, but is attacked as a fact in the proofs evidential of the existence of a crime in the determination of the controlling inquiry of probable cause and this because its counts do not show the existence of a crime.

Petitioner's Error.

It is the confounding of the indictment as a formal pleading with its use as a fact in the proofs which leads petitioner to the erroneous contention contained in the last paragraph, pg. 10, of his argument, that since the indictment sets forth the questions of disputed pertinency and alleges them to be "pertinent", the indictment is conclusive of probable cause and gives to the trial court exclusive and sole jurisdiction for the determination of that fact.

Conclusion of Circuit Court of Appeals.

The Circuit Court of Appeals, following the distinction as announced and repeatedly applied by this court held the indictment was not conclusive but prima facie evidence only

of probable cause, concluded "that the prima facie evidence * * * which the indictment established is overcome by its own terms in failing to charge a crime" because the propounded questions are not pertinent, and ordered the discharge of the respondent.

It is then petitioner's contention that the remanding court is without jurisdiction to determine the existence of a crime and that even though the indictment clearly and without doubt failed to disclose the existence of a crime, nevertheless the accused must be held in custody and remanded to the trial court for judicial determination of this evident fact.

It is submitted that this is oppressive administration of criminal law without reason, which this court has always condemned. The contention (1) fails to observe the purpose of the hearing which Section 1014 of the U. S. Revised Statutes gives the accused and emasculates the statute since it says trial court must decide existence of crime though there is doubt neither as to statutory definition of crime or acts alleged, (2) ignores the distinction between prima facie and conclusive use of the indictment as proof of probable cause, (3) disregards the necessity of finding probable cause, (4) ignores the existence of a crime as the most essential element in the finding of probable cause and (5) disregards the legal conclusions of this court that the question of pertinency is one of law and that the burden of proving pertinency is on petitioner.

Respondent's argument against petitioner's contention and in support of the conclusion and final order of the court below, may be stated and will be developed in the order following:

(1) The indictment is prima facie but not conclusive evidence of probable cause of either the existence of a crime or guilt of the accused.

(2) The indictment as prima facie evidence of probable cause may be overcome by its own terms because not charging a crime.

(3) The indictment does not charge a crime because the questions propounded as set forth in its counts are not "pertinent" to the investigation authorized by the Senate.

I.

THE INDICTMENT IS PRIMA FACIE BUT NOT CONCLUSIVE EVIDENCE OF PROBABLE CAUSE OF EITHER THE EXISTENCE OF A CRIME OR GUILT OF THE ACCUSED.

Few Circuit Courts of Appeal of the United States have so frequently and recently examined the law relating to probable cause in removal proceedings, as the three judges who decided this case.

In United States v. Glass (1928), 25 Fed. (2nd) 941, Judge Woolley writing the opinion of the Court, with the same members sitting, said:

> "The law on removal was correctly stated by the learned trial Judge and was recently reviewed by this Court in United States vs. Mathues, 19 Fed. (2d.) 22, and Swan v. United States, 23 Fed. (2d.) 148 with extended citation of supporting authorities."

He then stated that in the decision of that case he would "pursue the discussion solely on the law which we have before stated as follows:"

> "The indictment is introduced in proceedings under Section 1014, R. S. (18 USCA, Sec. 591), 'not to establish the appellant's guilt, but only as evidence to show that there was cause to believe his guilt probable enough to justify his removal for trial.'"

"The indictment is itself evidence that there was probable cause for finding it. Of this, however, the indictment is not conclusive * * * its evidential effect is only prima facie."

"Hence the accused may attack it as not charging a crime and therefore as not showing probable cause."

The above propositions are stated on the authority of Pierce v. Creecy (1907), 210 U. S. 387, and Morse v. United States (1924), 267 U. S. 81.

In Swan vs. United States (1928), 23 Fed. (2d.) 148, Judge Woolley points out the distinction above adverted to, in the language following:

"The requisite probable cause in removal cases may be proved by the indictment as evidence, or by other evidence without the production of the indictment, or, indeed, in advance of the indictment. * * * *When it is sought to be proved by the indictment, the instrument is prima facie evidence which may be overcome by its own terms when they fail to set forth a crime.* Yet no matter how inartificially it may be drafted, the Commissioner or Judge at a removal hearing has authority to pass upon its effect only in respect to its proof of probable cause. * * * He has no authority to determine the validity of the indictment when offered only as evidence. That is the function of the trial Court."

In *Pierce v. Creecy, supra*, the distinction between the two methods of attack or uses of the indictment in removal proceedings, is said "though narrow, is clear," by Mr. Justice Moody:

"The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not

whether the indictment is good enough, over reasonable challenge, to bring the accused to the bar for trial. *Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear.*"

He then points out that the one and primary inquiry is not the sufficiency of the indictment as a pleading, but, on the contrary, whether the acts set forth in the indictment charge a crime, saying:

> "Before proceeding further, it is well to set forth all the objections to the indictment made by counsel, in order to see whether, if any one of them is well founded, it shows that there was no charge of crime against the petitioner. For if all criticisms of the indictment should be approved, and they leave untouched in the pleading enough to show that the petitioner was charged with crime in the broad and practical sense in which those words ought to be understood, the condition prescribed by the Constitution has been performed."

After considering the separate exceptions, and pointing out that they all present "a mixed question of law and fact," he concludes that:

> "All the other objections are appropriate to a demurrer or a motion to quash or in arrest of judgment. They are attacks upon the indictment as a criminal pleading."

The language following is particularly applicable to the instant case, for he finds that:

> "The indictment, whether good or bad, as a pleading, *unmistakably describes every element of the crime of false swearing.*"

In Morse vs. United States (1924), 267 U. S. 81, the essential facts are stated as follows:

> "Appellants, under indictment in the District of Columbia, while passing through New York on February 6, 1923, on their way to Washington for trial, were arrested and taken from the train by a United States Marshal upon bench warrants issued on Federal indictments found in New York, charging them with fraudulent uses of the mails. Previously, their removal to New York from Connecticut and Massachusetts, respectively, for trial under these indictments, had been sought under Sec. 1014, Rev. Stat. (Com. Stat., Sec. 1674, 2 Fed. Stat. Anno. 2d ed., p. 654). The removal of Harry F. Morse from Connecticut had been granted by the Commissioner, but, upon *habeas corpus* proceedings, he had been discharged from custody by the Connecticut Federal District Court for want of probable cause, principally on the ground that the New York indictment was insufficient to charge a criminal offense (287 Fed. 907), although the New York court had previously held it good."

After a hearing at which the indictments were offered in evidence, together with other proofs, the writs were dismissed and Mr. Justice Sutherland states the second reason in support of error, in the following language:

> "It is urged that the decision of the Federal District Court in Connecticut, discharging Harry F. Morse, was *res adjudicata* and conclusively determined (1) that the New York bench warrant was *illegally issued*, and, therefore, could not be made the basis for the subsequent arrest in New York; and (2) *that the indictment was fatally defective.*"

This Court's answer to the second contention makes clear the distinction, for the learned Justice points out that it

"Proceeds upon a complete misconception of the purpose for which the indictment is produced and considered in removal proceedings, and the authoritative effect of the ruling of the Commissioner and the Court on *habeas corpus* in receipt thereof. The inquiry in such proceedings is whether there is probable cause to believe the prisoner guilty and justify his removal for trial."

He then says:

"The indictment was before the Commissioner simply as evidence for the purpose of establishing or *tending to establish the commission of an offense;* and the Commissioner had authority to pass upon its effect *in that aspect only.*"

He then concludes that neither the Commissioner nor the Court "*had authority to determine the sufficiency of the indictment as a pleading,*" and quotes the following excerpt from Mr. Justice Moody, in *Pierce v. Creecy* (1907), supra:

"*The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been, in fact, however inartificially, charged with crime in the State from which he has fled.*"

In short, in *Morse v. United States, supra,* it was contended (a) that the discharge of an accused in removal proceedings for want of probable cause, was conclusive of his guilt, and (b) that the indictment was insufficient as a criminal pleading, to sustain the charge of crime; and this Court denied both contentions, closing its opinion in the language following:

> "In other words, the Commissioner, or the Court, in review on *habeas corpus*, for lack of power cannot *conclusively adjudge the indictment, qua indictment, to be either good or bad, or pass finally upon the guilt or innocence of the accused.*

Henry v. Henkel (1914), 235 U. S. 219, does not modify either the law or practice as uniformly announced and applied by this Court. Mr. Justice Lamar, however, in the Henry case, emphasizes the fact that *where under all the proofs a doubt exists* as to whether the acts charged in the indictment or proved at the hearing disclose a crime, the removal Court should refuse the writ and remand the issue to the decision of the trial court.

The facts of *Henry v. Henkel* and of the instant case, are similar in so far as the indictment grew out of the refusal to answer questions before a legislative body. They differ, however in essential particulars. The Henry case suggested that the questions asked were neither relevant nor proper, and stressed the unconstitutionality of the Act which required the giving of information which was dishonorable for the witness to disclose. Counsel in that case urged that the unconstitutionality of the statute was so clear as to warrant the removal Court in so deciding as a matter of jurisdiction. This Court was of different opinion, and *expressing doubt as to its constitutionality*, remanded the issue to the trial Court for final decision.

That case did not decide the issue raised in the instant petition, namely, should the removal Court decide as matter of law, that no crime is charged where the acts alleged in the indictment or proved at the hearing, clearly and without doubt, negative as matter both of fact and law, the existence of the crime charged.

Mr. Justice Lamar, on page 225, after referring to the fact that the scope of inquiry under the resolution of the House of Representatives was "the activities of national banks * * * and groups of financiers," says:

"That the witness 'was asked to give the names of those composing the New York syndicate but claimed to have the right under the Constitution to decline to answer the question, saying, also, that he "did not want to disclose the names of the participants in the New York syndicate, although he understood it to be the wish of the subcommittee that he should, for the reason that he would consider it dishonorable to reveal the names of his customers unless compelled to do so."' "

He then states, on page 227, that the defendant argued that, "in view of the provisions of the 4th Amendment to the Constitution, neither House can compel a citizen to disclose his private affairs as a basis for legislation."

"They therefore contend that the papers show on their face that there was no jurisdiction to issue the warrant on which he was held, and that Henry should not be subjected to the hardship of being removed to the District of Columbia to stand trial upon an indictment which affirmatively shows that no crime has been committed."

He then discusses the law, and concludes that the facts of the Henry case are not within the rule announced in the cases relied upon by the petitioner, saying, on page 229:

"Manifestly, this is true as to *disputed* questions of fact, and it is equally so as to *disputed* matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other *controverted* matters of law, and fact are for the determination of the trial Court."

He then reviews the cases in support of his conclu-

sion, but is careful to add the principle, in language which is particularly applicable to the instant case, saying, on page 230:

> "The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute *making an offense of the acts charged.* In such case the committing Court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218."

In the succeeding sentence, he then sets forth the rule that a statute should, by the removal Court, be declared unconstitutional only "when plainly and palpably void."

It will then be observed that the Henry case recognizes the practice and announces the rule herein contended for by respondent, who suggests the only inquiry in this case is whether the proofs of the instant proceeding so clearly disclose that the acts charged in the indictment and proved at the trial, do not constitute any crime as to justify the removal Court in so deciding as matter of undisputed law or fact.

Benson v. Henkel (1904), 198 U. S., p. 11, is also an authority in accord with Pierce v. Creecy, supra, and Morse v. U. S., supra. After stating the general rule on page 10, "That the legal sufficiency of the indictment is only to be determined by the Court in which it is found," Mr. Justice Brown says:

> "Of course this rule has its limitations. If the indictment were a mere information, *or obviously, upon inspection, set forth no crime against the United States,* or a wholly different crime from that alleged as the basis for proceedings, or if such crime be

charged to have been committed in another district from that to which the extradiction is sought, the Commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause."

On the necessity of the indictment setting forth such acts as will charge a crime, the learned Justice says:

"While the principle laid down in some of the earlier cases in this Court, that an indictment upon a statute is ordinarily sufficient if framed in the language of the statutes has been somewhat qualified in later cases, the rule still holds good that where the statute contains every element of the offense, and an indictment is offered in evidence before the extradition Commission as proof of probable cause, it is sufficient if framed in the language of the statute with the ordinary averments of time and place, *and with such a description of the fraud, if that be the basis of the indictment, as will apprise an intelligent man of the nature of the accusation,* notwithstanding that such indictment may be open to motion to quash or motion in arrest of judgment in the court in which it was originally found. An extradition Commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint upon which he acts *or the indictment offered in support thereof contains the necessary elements of the offense,* it is sufficient, although a more critical examination may show that the statute does not completely cover the case."

Rodman vs. Pothier, (1923), 264 U. S. 399, does not question, but on the contrary distinctly announces the

law as stated and applied by the Court below. The question involved in the Rodman-Pothier case was whether or not the prima facie of probable cause established by the indictment was overcome by the other facts introduced by the relator. This question depended on whether or not the alleged crime was within the exclusive jurisdiction of the United States, and this in turn on the question whether the United States had acquired title to the land embraced within a certain reservation. The District Court was of opinion that, p. 402:

> "The defendant has failed to overcome the prima facie case made by the indictment and that the evidence fails to show the want of probable cause."

Mr. Justice McReynolds then points out, p. 402 that:

> "The Circuit Court of Appeals (291 Fed. 311) was 'of the opinion that no other conclusion can be drawn from the evidence than that, at the time the crime charged in the indictment was committed, the United States had acquired no title in the land embraced within Camp Lewis Military Reservation.' . . . This being so there is an absolute want of probable cause for the removal of the appellant to answer to the crime charged."

He then gives this Court's conclusion to the contrary, because the principal question of exclusive jurisdiction and collateral question of title to the land involved "*consideration of many facts and seriously controverted questions of law,*" saying on page 402:

> "We think there was enough to show probable cause, and that the judgment of the district court is correct. Whether the locus of the alleged crime was within the exclusive jurisdiction of the United States

demands consideration of many facts and seriously controverted questions of law. As heretofore often pointed out, these matters must be determined by the court where the indictment was found."

At the bottom of page 402, the opinion closes with the statement: that it is because of the presence of disputed questions of fact and controverted matters of law, that these questions were remanded to the trial court.

> "Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court."

The following late case decided by the U. S. Circuit Court of Appeals for Second Circuit, is called to the attention of this Court as in accord with the law as by it announced and applied:

United States ex rel. Brody v. Hecht (1926), 11 Fed. Rep. 2nd Ser. 128, wherein the habeas corpus was sustained on the ground that the indictment and other facts in evidence not being in dispute clearly established that no crime was charged in the indictment.

Circuit Judge Rodgers tersely states the rule as follows, p. 134:

> "It must also be admitted that in a removal proceeding, in which there are disputed questions of fact or disputed matters of law, such controverted matters of law or fact must be left for the determination of the court where the indictment was found, and cannot be decided by the court in which the removal proceeding is heard. * * * *It is, however, an entirely differ-*

ent matter where in such a proceeding there are no disputed questions of fact or of law, and it clearly appears that the offense charged in the indictment was not committed in the district in which the indictment was found."

II.

THE INDICTMENT AS PRIMA FACIE EVIDENCE OF PROBABLE CAUSE MAY BE OVERCOME BY ITS OWN TERMS BECAUSE NOT CHARGING A CRIME.

It was on the authority of Tinsley v. Treat (1906), 205 U. S. 20, that His Honor, Judge Wooley, reached the conclusion in U. S. ex rel. Haim v. Mathues (1927), 19 Fed. Reporter (2d) 22, that the accused may attack the indictment as not charging a crime, and in Swan v. United States, supra, that when probable cause "is sought to be proved by the indictment, the instrument is prima facie evidence which may be overcome by its own terms when they fail to set forth a crime."

In U. S. ex rel. Tassell vs. Mathues (1926), 11 Fed. R. (2nd), 53, Judge Davis says:

> "If the indictment clearly fails to charge a crime, it is bad, and a defendant should not be removed to a district to answer the crime with which he has not been charged."

In *Tinsley v. Treat* (1906), 205 U. S. 20, in an opinion by Mr. Chief Justice Fuller, this Court said:

> "It was held in Beavers v. Henkel, 194 U. S. 73; Benson v. Henkel, 198 U. S. 1; Hyde v. Shrine, 199

U. S. 62, as well as Greene v. Henkel, *supra*, that an indictment constituted *prima facie* evidence of probable cause, but not that it was conclusive.

We regard that question as specifically presented in the present case and we hold that the indictment cannot be treated as conclusive under Section 1014.

This being so, we are of opinion that the evidence offered should have been admitted. It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the District or Circuit Judge. Of course if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only *prima facie*, then evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that district could not be regarded as immaterial.

The Constitution provides that 'The trial of all crimes, except in cases of impeachment, shall be by jury and such trial shall be held in the State where the said crimes shall have been committed' (Article III, Section 2); and that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed' (Amendment VI); and in order that any one accused shall not be deprived of this constitutional right, the Judge applied to to remove him from his domicile to a district in another State must find that there is probable cause for believing him to have committed the alleged offense and in such other district. And in doing this his decision does not determine the question of guilt any more than his view that the indictment is enough for the purpose of removal definitely determines its validity.

Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District Judge had thereupon determined

that probable cause existed, and, such determination could not be revised on habeas corpus, it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. Nor can the exclusion of the evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution.

This conclusion is fatal to the order and warrant of removal and requires a reversal of the judgment below and the discharge of appellant."

In Morse vs. United States, *supra,* Mr. Justice Sutherland stated that the indictment was before the commissioner as evidence only for the purpose of establishing or tending to establish the commission of a crime.

In *Pierce v. Crecy, supra,* Mr. Justice Moody points out that in that case,

"The only condition which it is insisted is absent is the charge of a crime. The only evidence of a charge of crime is the indictment, *and the contention to be examined is that the indictment is insufficient proof that a charge has been made.*"

He then points out the distinction between attacking the indictment as a criminal pleading, and as a fact in the proofs evidential of probable cause, saying that

"Counsel conceded that they cannot successfully attack the indictment except by showing that it does not charge a crime."

In *Henry v. Henkel, supra,* Mr. Justice Lamar concedes the right of an accused to attack the indictment as not charging a crime, in the following language:

"The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute *making an offense of the acts charged.* In such cases the committing Court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Green v. Henkel, 183 U. S. 261, 46 L. ed, 189, 22 Sup. Ct. Rep. 218."

Beavers v. Henkel (1903), 194 U. S. 76, cites the case *Green v. Henkel,* 183 U. S. 249, and recognizes the practice permitted both before the Commissioner and the removal Court on *habeas corpus* of the accused's rights to introduce evidence on the question of probable cause in rebuttal of the *prima facie* proof of the indictment.

In Greene v. Henkel (1901), 183 U. S. 261, the accused was permitted to attack the indictment as not charging a crime, but this court held on other evidence being introduced that probable cause was shown.

Every case referred to by petitioner with the exception of Hyde v. Shine (1904), 199 U. S. 62; Horner vs. United States (1891), 143 U. S. 570; and Hughes v. Gault (1925), 271 U. S. 142, herein has been analyzed; and it is submitted none of the cases sustain his contention, but are authorities for the proposition that the remanding court may discharge the accused if the indictment does not charge a crime or all the evidence does not show probable cause that a crime exists.

Hyde vs. Shine, supra, is in accord with the law as stated by the Circuit Court of Appeals on the authority of Pierce vs. Creecy, supra; Rodman vs. Pothier, supra and Morse vs. United States, supra. Mr. Justice Brown on page 84 says:

"In the Federal courts, however, it is well settled

that upon habeas corpus the court will not weigh the evidence, *although if there is an entire lack of evidence to support the accusation the court may order his discharge.* In this case, however, the production of the indictment made at least a prima facie case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause."

The dissenting opinion by Mr. Justice Peckham concurred in by Justices White and McKenna, says, page 86:

"The indictment constitutes prima facie evidence of probable cause, but evidence may be given to rebut it."

The learned Justice further says on page 87:

"The right is none the less, when the want of probable cause rests upon conclusive evidence of the absence of the defendants from the district at the time when the indictment alleges the conspiracy was formed in such district. If defendants were not then there, they could not be guilty of the crime charged in the indictment."

The dissenting opinion closes with the following sentence:

"The enforcement of the criminal law should not be made oppressive in such cases, and, therefore, when it appears there was no probable cause to found the indictment upon, the order of removal should be refused."

In Horner vs. United States, supra, the accused was not arrested on a warrant after indictment found, but was

arrested on complaint on oath of a post office inspector before a United States commissioner. On habeas corpus it was contended that the circular set forth in the complaint is not included in the prohibition of Sec. 3894, of the Revised Statutes (against lottery) and that the accused committed no offense by depositing the circular in the mail. The Circuit Court dismissed the petition and an appeal or writ of error was taken direct to this court under Section 5 of the Act of March 3, 1891, because the constitutionality of the Statute was drawn in question.

This court in an opinion by Mr. Justice Blatchford, on page 577, said:

> "But we are of opinion that that question ought not to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await the action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court on this appeal, nor was it proper for the Circuit Court, on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery."

In Hughes vs. Gault, supra, the indictment was held sufficient and the accused remanded. Mr. Justice Holmes on page 151 says:

> "We do not regard the attack upon the indictment as needing discussion. It has been upheld by a number of district courts and by the circuit court of appeals for the sixth circuit as sufficient for removal purposes."

The question there presented was whether or not the refusal of the commissioner to admit evidence of inno-

cence was deprivation of a *constitutional* in contradictinction to a *statutory* right under the constitution.

Mr. Justice Holmes after pointing out on page 149 that "the Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the court having jurisdiction of the charge," then points out

> "'In Tinsley v. Treat, 205 U. S. 20, 33, 51 L. ed. 689, 695, 27 Supp. Ct. Rep. 430, the conclusion is not that the appellant by being denied the right to present any evidence was deprived of his rights under the Constitution, but that he was denied 'a right secured by statute under the constitution'."

It should be pointed out that in this case, Mr. Justice Brandeis in his dissent was of opinion that

> "by refusing to hear and to consider evidence introduced or offered which bore upon the existence of probable cause, the commissioner * * * deprived the petitioner of his liberty without due process of law in violation of the 5th Amendment, because he was denied a fair hearing."

Reference here should be made to Circuit Judge Woolley's conception of the law as stated by this court in Hughes vs. Gault, supra. In United States vs. Mathues (1927), 19 Fed. Rep. (2nd) 23, after referring to this case "as the latest authoritative announcement on the subject," he says "The law of that case and of other cases there approved * * * is substantially as follows:

> "One accused of crime by indictment in a distant district, though liable to trial wherever indicted, cannot be arbitrarily and summarily removed from the district of his residence, but is entitled to a prelimin-

ary hearing. Such preliminary hearing is not a preliminary trial. It is had before a committing magistrate, who may be a judge, commissioner, mayor of a city, or justice of the peace, and it is only such as will bring out the probable cause of the charge and make certain the identity of the defendant. These are the two things that must be established before the accused can be lawfully removed. In such a hearing the function of the magistrate is not ministerial but is judicial in the limited sense indicated. He must pass on the question of identity—an issue purely of fact—and also on that of probable cause. The indictment is itself evidence that there was probable cause for finding it. Of this, however, the indictment is not conclusive. Tinsley v. Treat, 205 U. S. 20, 32, 27 S. Ct. 430, 51 L. Ed. 689; its evidential effect is only prima facie. Hence the accused may attack it as not charging a crime and therefore as not showing probable cause."

III.

THE QUESTIONS PROPOUNDED AS SET FORTH IN THE COUNTS OF THE INDICTMENT ARE NOT PERTINENT TO THE INVESTIGATION AUTHORIZED BY THE SENATE.

The ultimate contention of petitioner is that the pertinency of the questions propounded should have been left to the determination of the trial court and this because the remanding court is without jurisdiction in the premises. This contention ignores the conclusion of this court, that the question of pertinency is one of law and not of fact and that the burden of proving pertinency is on the petitioner.

QUESTION OF PERTINENCY IS OF LAW FOR THE COURT.

Petitioner would seem to suggest that because there is some question of fact, the determination of pertinency should be remanded to the trial court.

This court in *Sinclair vs. United States* (1928) 279 U. S. 263, in an opinion by Mr. Justice Butler, held in analogy to relevancy and materiality that the question of pertinency arising under Section 102 of the Revised Statutes was *of law for the court;* and what is particularly applicable to the instant case,

> "That it would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

In this case it has always been the contention of the respondent that the question of pertinency was one of law for the court and not one of fact for the jury; and that the pertinency of the questions being free of doubt, it is clear as matter of law that no crime was charged in the indictment.

Petitioner in the petition for rehearing suggests that the Sinclair case "also presents reasons why your Honorable Court may be disposed to consider the propriety of granting a reargument". The Sinclair case did not decide, as petitioner would leave this court to believe, that in removal proceedings the trial court must, and the court of asylum may not decide this question. No question of removal on habeas corpus proceedings arose. The question there was raised by counsel taking the position that the question of pertinency was one of fact for the jury in contradictinction to one of law for the Court; and this Court in analogy to questions of relevancy held that pertinency was a question of law.

Mr. Justice Butler, on page 299, says:

"The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under Sec. 102. The matter for determination in this case was whether the facts called for by the question, were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent to the question under inquiry.' It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

BURDEN OF PROOF OF PERTINENCY.

Sinclair vs. United States also settled another important and controverted question which arose at the first and second arguments of the instant case, and that is the party on whom rests the burden of showing the pertinency of the questions. His Honor Circuit Judge Buffington held in *United States vs. Barry* (1928) 29 Fed. (2nd) 817, that the burden rested on the Government, saying on page 821,

"But a ruling on the admissibility of evidence is not made on surmises. It is based on the ground that the burden of showing the relevancy of any testimony which is objected to is on him who proposes to give it."

Mr. Justice Butler in the Sinclair case held as matter of law that in criminal prosecution under Section 102 of the Revised Statutes the burden rests "*on the United States to plead and show that the questions pertained to some matter under investigation*". He says on page 296:

"Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the com-

mittee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation."

PERTINENCY DECIDED ONLY BY CIRCUIT COURT OF APPEALS.

The pertinency of the questions propounded has come to the attention of the District Court *Barry v. United States ex rel. Cunningham*, 25 F. (2d) 733, the Circuit Court of Appeals in an opinion filed May 17, 1929, *United States ex rel. Cunningham v. Matheus* and this court *Barry v. United States ex rel. Cunningham* (1928) 279 U. S. 597, in this removal proceeding and in the collateral senate warrant of arrest proceeding in *United States ex rel. Cunningham Appellant vs. Barry of United States Senate et al.* (1928) 29 Fed. (2nd) 817. The Circuit Court of Appeals, however, is the only court that has expressly passed upon as matter of law, the pertinency of the propounded questions.

In *United States vs. Barry, supra*, in an opinion by Judge Buffington, the Circuit Court of Appeals held that the questions were not pertinent, and in the instant case in the opinion filed by the same Judge, said:

"The entire evidence constituting the alleged crime with which the relator is charged is contained in the indictment. It consists in the refusal to answer the questions asked. The inquiry related entirely to the primary election. If the questions were pertinent to the investigation authorized by the Senate, probable cause has been established, but if

they were not pertinent, it has not been established. We recently considered the pertinency of these very questions in the case of United States ex rel. Cunningham v. Barry, 29 Fed. (2d) (817) and there said:

> 'After full consideration, we are of opinion no facts, reasons, or grounds have been shown or now appear which make pertinent the inquiry into how Cunningham made the money which he admits he contributed. That a situation might arise where the facts would show such questions were pertinent goes without saying, but under the present situation and no such facts appearing, we hold Cunningham was justified in declining to answer the questions asked him, and that this warrant, whose only foundation is alleged contempt for refusal to so answer, has no support in law. Accordingly we hold the court below was in error, and the record will be remanded with instructions to discharge the petitioner.' "

The opinion of the Circuit Court of Appeals in the Barry case is reported in 29 Fed. (2nd) 817, and the opinions of that Court after the first argument and reargument are found respectively on page 261, 33 Fed. (2d) and Appendix "A" of this brief.

Judge Dickinson in his opinion discharging the writ of habeas corpus in this case on the question of pertinency said on page (91 R.)

> "In the view we take the pertinency of the questions asked is not one by which we should determine the other question of whether this defendant should stand trial, and in consequence we should pass no opinion upon the question of pertinency further than the statement of the broad proposition that we de-

cline to rule that no substantive offence is charged in this indictment."

Petitioner in the Matheus case in his petition for a writ of certiorari page 6 says:

> "The pertinency of the questions affirmatively appears from the transcript of respondent's testimony."

and the inference might arise as contended for by petitioner on reargument, as therein stated, since "this testimony was recited in the opinion of this court in *Barry vs. United States ex rel. Cunningham* (1928) 279 U. S. 597, that this court had passed on the pertinency of the questions propounded. This court, because unnecessary in express terms refused to pass on the pertinency of the questions.

Mr. Justice Sutherland in *Barry vs. United States ex rel. Cunningham, supra,* after pointing out that the Circuit Court of Appeals had held

> "That the information sought to be elicited and which Cunningham refused to give was not pertinent to the inquiry authorized to be made by the Committee and that Cunningham was justified in declining to answer the questions in respect thereof" says in support of its conclusion of error:
>
> "We must accept this unequivocal language as expressing the purpose of the Senate *to elicit testimony in response to questions to be propounded at the bar of the Senate,* and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial."

The opinion then concludes:

"It is not necessary to determine whether the information sought was pertinent to the inquiry before the committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original and unqualified power conferred by the Constitution."

Circuit Judge Buffington in the opinion of the Circuit Court of Appeals, after reargument, in determining that the Barry case did not rule the instant habeas corpus proceeding says:

"The indictment in the present case * * * concerns solely what had already taken place before a committee of the Senate. When Cunningham refused to answer the questions propounded by that committee, his crime * * * was complete and for that completed crime he was indicted. As his entire acts were set forth in the indictment, the court, on the application for removal, was required to determine whether probable cause was shown * * * we held the lack of probable cause was shown in that the inquiry made of Cunningham was not pertinent because no power had been conferred by the Senate on this committee to make such inquiry.

* * * the case of Barry v. Cunningham, supra, as held by the Supreme Court, concerned what took place afterwards, namely, the action of the Senate in attaching Cunningham and bringing him before it * * * 'to answer such questions pertinent to the matter under inquiry as the Senate * * * may propound,' * * * *It will thus be seen that so far as questions to Cunningham are concerned the indictment in the present case concerned questions already asked and refused*

to be answered, while the Barry case concerned questions to be asked in the future."

It is then evident that the Circuit Court of Appeals alone has passed on the pertinency of the questions, and that no opinion of any judge or court questions the correctness of the conclusion reached by that court as to their non-pertinency.

It is suggested that the opinion of Judge Dickinson would seem to indicate that the questions were not pertinent. It may also be argued that if either Judge Dickinson or Judge Woolley had been of opinion that any of the questions were pertinent, intimation could and probably would have been given to that effect. It may also be suggested that if this court had been of opinion that the questions were pertinent when asked by the committee, there would have been no necessity for the distinction as made by Justice Sutherland in the Barry case, and with propriety and logically this court could have finally decided that the questions were pertinent when propounded within the limitations imposed on the committee as well as when asked by the Senate itself exercising the full, original and unqualified power conferred by the Constitution.

Questions Not Pertinent.

It is deemed sufficient in considering the question of pertinency only to advert to the scope of the investigation and to the manner in which the questions by the witness were met.

Resolution 195 of the 69th Congress authorized the appointment of a Special Committee, defined the scope of its inquiry and granted to it powers incidental and necessary to the performance of its duties.

The limit of the authority of the special committee was in its language to "investigate what moneys * * * or

things of value * * * have been promised, contributed, made or expended * * * by any person, firm, corporation or committee, organization to influence the nomination of any person as a candidate * * * for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926."

The resolution then instructs the Committee to "report the names of the persons, firms or corporations, etc., * * * that have made * * * such promises * * * or payments and the amount of them * * * together with all facts in relation thereto."

The funds of money raised, the names of the contributors and the amounts contributed together with the relevant facts to influence the nomination of any person as a candidate for the United States Senate at the general election to be held in November, 1926, constitute the subject-matter and embrace the scope of the Committee's authority.

The witness testified truthfully and concisely to his official position and the different business in which he was interested; to the facts (a) of two contributions, (b) the amount of each (c) the form in which made (d) to whom and (e) when the respective contributions were made; and specifically testified that (f) the contributions were his personal donation and (g) from his personal estate.

He refused to answer any question (a) touching upon his wealth or (b) the course or (c) the manner of its accumulation or (d) out of what part of his personal estate either contribution came, or (e) how long the part contributed had been his property.

The opinion of the Circuit Court of Appeals at great length sets forth the questions which respondent answered, as well as the questions bearing on the inquiry

which he answered fully and also the questions which he did not answer because by him deemed not pertinent. The opinion then states the scope of the inquiry as follows:

> "Turning, then, to the underlying question, was Cunningham in contempt in declining to answer the questions asked? The answer to that is, Were such questions relevant to the inquiry the Committee was authorized to make? That inquiry, so far as here pertinent was 'to investigate what moneys * * * have been * * * contributed * * * by any person * * * to influence the nomination of any person as a candidate * * * for membership in the United States Senate at the General Election to be held in November, 1926.' Such being the items of inquiry, the resolution provided for a report thereof to the Senate by the Committee of such items, viz., 'said committee shall report the names of the person * * * that have made such * * * payments and the amounts by them severally contributed * * * including the methods of expenditure of said sum * * * together with all facts in relation thereof.' And that the matters so specified constituted the scope of the committee's inquiry was evidenced by the resolution providing for imposing the penalties of Revised Statute 102 upon a witness who 'having appeared refused to answer any question pertinent to the investigation heretofore authorized'."

The opinion then proceeds with careful analysis to point out that the respondent had given full testimony and complete answer on every possible element of the inquiry and that the questions propounded are not pertinent, saying:

> "Turning to the inquiry heretofore specified as authorized, we note that Cunningham, as bearing

on 'what moneys * * * have been contributed,' testified he had contributed fifty thousand dollars. As bearing on the question whether such money was contributed 'to influence the nomination of any person as a candidate for membership in the United States Senate,' he testified that he paid the money to Thomas F. Watson, treasurer of a political organization which was supporting the Vare for nomination for United States Senator and Beidleman for Governor; that while he favored and supported Vare as a candidate his whole object in giving the money was to assist Beidleman, and if Beidleman 'had not been on the ticket I would not have given it.' Touching the subject of investigation described as 'including the method of expenditure of said sums,' Cunningham testified he did not know whether his contribution had been reported in Beidleman's campaign expenses, adding 'I instructed Mr. Watson what my thought was about it.' It will thus be seen that Cunningham answered the questions asked him on the subjects specified in the resolution and that his answers enabled the committee, so far as the inquiry concerned him to fulfill the specified duties of their appointment, viz: to 'report * * * payments and the amount by them severally contributed * * * including the method of expenditure of said sums.' Such being the case, we do not see that proof of how Cunningham came by the money he says he thus personally contributed, could affect the objects of investigation referred to by the Senate to the Committee."

It is evident that the counts of the indictment do not disclose the essential elements of the crime charged *in that standing alone, none of the counts shows the pertinency of the questions propounded;* but clearly and without dispute of either fact or law, are not within the scope of the committee's investigation.

No effort is made in petitioner's argument to meet the burden which the law imposes on him to show the pertinency of the questions, other than to urge their pertinency to test credibility.

It may be argued that the witness having given all the information within his knowledge and contemplated under the authority of the Senate, should not be exposed on mere surmise or suspicion to a cross-examination for the purpose of testing his credibility; and that the Committee should indulge the presumption that a witness is telling the truth who voluntarily appears in discharge of his duty as a citizen before a Committee.

It is not suggested that Congress must be bound by the testimony of the witness, nor that it be precluded from asking any question that may be material or relevant to the legislative inquiry, but only urged the necessity of ending questions that impinge on his personal affairs, when the witness has given all information essential to or within the scope of the legislative inquiry and there is no known fact which impeaches the truth of his testimony.

Attention should be called to the case of Sinclair vs. United States (1928), 279 U. S. 263, for therein Mr. Justice Butler reviews the cases which emphasize the caution with which this Court will safeguard the individual against unreasonable inquiries into his personal affairs.

SUMMARY.

Respondent denies petitioner's contention that the indictment is conclusive of probable cause and that the trial court consequently has exclusive jurisdiction to determine the existence of a crime. He submits that the indictment when offered in evidence as proof of probable cause may be attacked if its counts do not charge a crime and this because the existence of a crime is the most essential element in the determination of probable cause.

The burden was on petitioner to show that the ques-

tions propounded pertained to some matter under investigation by the Senate committee; and the determination of the question of pertinency is one of law for the court of asylum and not of fact for the trial court.

The entire evidence of probable cause or its lack consists alone of the indictment and the transcript of the notes of testimony; and consequently the facts in evidence are free from doubt or dispute.

It is evident that the respondent gave to the committee all information that it was possible for him to give within the scope of its inquiry or that could aid it in any manner in the performance of its duties; and it is crystal clear that the questions by him not answered related to personal affairs of the most delicate nature, and properly regarded by all men as sacred.

It is further suggested that this court is without jurisdiction because paragraphs "a" and "b" of Section 240 of the Judicial Code, as amended by the Act of February 13th, 1925, following:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> (b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may at the

election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

must be read together, and neither the Constitution nor any statute is construed. Paragraph "a" does not enlarge the jurisdiction; it permits direct appeal in any criminal or civil case only when appeal is allowed by the other sections.

In conclusion, it is submitted that the pivotal inquiring in this proceeding then is, whether the questions propounded are pertinent; and it is suggested that this is so free from doubt as to permit the remanding court to conclude, as stated by the Circuit Court of Appeals, that "the indictment's prima facie evidence of probable cause is overcome by its own terms in failing to charge a crime."

The petition should be dismissed.

All of which is respectfully submitted.

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APPENDIX "A".

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 3857. October Term, 1928.

UNITED STATES OF AMERICA EX REL.
THOMAS W. CUNNINGHAM,
Appellant,

v.

W. FRANK MATHUES, UNITED STATES MARSHAL,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed June 13, 1930.)

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges.*

BUFFINGTON, *J.*

After the opinion of this Court was filed, the case of Barry v. Cunningham, 279 U. S. 597, was decided. Thereupon the Government, conceiving that our decision was at variance with the holdings of the Supreme Court in that case, moved a rehearing be had. The motion was granted and such rehearing was given. On due consideration the members of the Court adhere to their views already ex-

pressed in the opinion and the dissent heretofore filed. We therefore confine the present opinion to a brief statement of why we do not regard the Barry case as ruling the present one. The indictment in the present case in the Federal Court for the District of Columbia concerns solely what had already taken place before a Committee of the Senate. When Cunningham refused to answer the questions propounded by that Committee, his crime of contempt, if such it be, was complete and for that completed crime he was indicted. As his entire acts were set forth in the indictment, the Court, on the application for removal, was required to determine whether probable cause was shown. On that question we held the lack of probable cause was shown in that the inquiry made of Cunningham was not pertinent because no power had been conferred by the Senate on this Committee to make such inquiry.

On the other hand, the case of Barry v. Cunningham, *supra*, as held by the Supreme Court, concerned what took place afterwards, namely the action of the Senate in attaching Cunningham and bringing him before it "then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said Committee, or the President of the Senate, may propound," etc. It will thus be seen that so far as questions to Cunningham are concerned the indictment in the present case concerned questions already asked and refused to be answered, while the Barry case concerned questions to be asked in the future. In deciding the case before it, the Supreme Court explicitly stated what it did and what it did not decide, namely,

> "We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the commit-

tee had been directed to make may be put aside as immaterial.

"It results that the following are the sole questions here for determination: (1) whether the Senate was engaged in an inquiry which it had constitutional power to make; (2) if so, whether that body had power to bring Cunningham to its bar as a witness by means of a warrant of arrest; and (3) whether as a necessary prerequisite to the issue of such warrant of arrest a subpoena should first have been served and disobeyed."

This question of the pertinency of those questions, which the Supreme Court thus stated it did not pass upon, is the very question which we did then pass upon and which we are now constrained to pass upon in the present case. Adhering, as we have said, to the respective views heretofore held on that question, we adhere to our previous opinion and in doing so, we do not, in our view, disregard the holdings of the Supreme Court.

A true Copy:

Teste:

.....

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930. No. 720.

WALTER C. FETTERS, United States Marshal for the Eastern District of Pennsylvania,
Petitioner,

vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM,
Respondent.

Brief for Respondent on a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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Supreme Court of the United States

October Term, 1930. No. 720.

WALTER C. FETTERS, United States Marshal for the Eastern District of Pennsylvania,

Petitioner,

vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM,

Respondent.

BRIEF FOR RESPONDENT ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL STATEMENT.

Petitioner's statement, page 4, should be supplemented by the essential facts stated in the opinion filed by Buffington, C. J., in the Circuit Court of Appeals in the former habeas corpus proceeding, which was made a part of the return in the instant proceeding (Petitioner's Brief, p. 5); since as concluded by Judge Dickinson in the District Court (R. 104), that opinion determines the law of the case and made necessary respondent's discharge, which by him was ordered (R. 107). That opinion states (33 F (2d) 261):

"On May 18, 1926, a primary election was held in Pennsylvania and William S. Vare received the Republican nomination as a candidate for the United States Senate. At the general election held on November 2, 1926, he was elected United States Senator. Thereafter a petition was presented to the Senate contesting his election on the ground that fraudulent and unlawful practices were used in connection therewith.

On May 19, 1926, the Senate of the United States by resolution 195 created a committee of five members and authorized and instructed it,

'To investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall, hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto * * *

'The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee wilfully makes default, or

who, having appeared, refused to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by Section 102 of the Revised Statutes of the United States.

'Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

Pursuant to the resolution, the committee held a meeting at Washington in the District of Columbia, on February 21, 1927, at which the relator appeared in obedience to a summons of the committee but refused to answer certain questions asked by the committee on the ground that they related to his personal business and were not pertinent to the investigation authorized by the Senate.

The relator was thereafter on April 20, 1928, indicted by a grand jury in the Supreme Court of the District of Columbia, for refusing to answer the questions, which related to his contribution of $50,000 to Mr. Thomas F. Watson, chairman of the City Committee of Philadelphia, for use in the Primary election, in which William S. Vare was nominated.''

The indictment contains six counts. The questions and answers follow:

FIRST COUNT.

"Mr. Cunningham: I handed money to Thomas F. Watson $25,000 on the 10th day of April, 1926.

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

The Chairman: Your own private moneys?

Mr. Cunningham: Yes, sir, my own money, my own money.

The Chairman: How long had it been your own money?

Mr. Golder at that time stated an objection, which appears in the record.

The question was repeated as follows (reading):

The Chairman: How long had it been your own money?

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business."

SECOND COUNT.

"The Chairman. Where did you get this $25,000 you say you gave to Mr. Watson?

Mr. Cunningham: I refuse to answer that question, I think that is personal."

THIRD COUNT.

"The Chairman: Where were you keeping the $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it."

FOURTH COUNT.

"The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

Mr. Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it.

FIFTH COUNT.

"The Chairman: Mr. Cunningham, how long had you had this money in your possession?

Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it."

SIXTH COUNT.

"The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: That is another personal question. I cannot answer that."

On an affidavit of S. Busha, a warrant was issued and the relator was arrested and brought before Judge Dickinson who appears to have sat in three proceedings: 1. Committing magistrate, 2. Motion for warrant of removal, and 3. Hearing upon writ of habeas corpus.

As above stated, the writ of habeas corpus was dismissed, the warrant for removal was allowed and the relator was remanded to the custody of the United States Marshal for removal to the District of Columbia.

An appeal was taken and the question before us is

whether or not probable cause of the relator's guilt is sufficient to justify his removal for trial."

The Circuit Court of Appeals in an opinion by Buffington, C. J., with Davis, C. J., concurring and Woolley, C. J., dissenting, reversed Judge Dickinson's judgment on the ground that "prima facie evidence of probable cause which the indictment established is overcome by its own terms in failing to charge a crime," because the questions propounded were not pertinent (33 F (2d) 261).

After the decision of the Supreme Court of the United States in Barry vs. Cunningham (1929) 279 U. S. 597, a petition for reargument was filed, which averred that the decision of the Circuit Court of Appeals was at variance with the holdings of this Court in that case and the cases following:

Rodman vs. Pothier (1923), 264 U. S. 399;
Morse vs. United States (1924), 267 U. S. 83, and
Henry vs. Henkel (1914), 235 U. S. 219.

On rehearing, the Circuit Court of Appeals, in its opinion which is printed at the end of this book, marked Appendix "A", said:

"We adhere to our previous opinion, and in doing so, we do not, in our view, disregard the holdings of the Supreme Court." The final judgment was then entered "with instructions to discharge the relator."

Petition for writ of certiorari and suggestion of abatement, because of failure to substitute, within the statutory period, the successor of the marshal who had gone out of office, were filed in this court; which on October 27th, 1930, granted the writ, vacated the judgments of the courts below and remanded the cause to the District Court with directions to dismiss the proceedings as abated. Mathues vs. United States Ex rel. Cunningham (1930), 282 U. S. 123.

Respondent surrendered himself to Fetters, the United States Marshal in office, filed his new petition for writ of habeas corpus (R. 3-6) to which a return was filed (R. 32-35) and traversed (R. 102-3).

It was stipulated by counsel that "the hearing * * * shall be determined upon the petition, the writ, the return * * * and traverse to the return, including the former habeas corpus proceeding" (R. 103).

Judge Dickinson concluded that "the law of the case * * * is what the Circuit Court of Appeals has declared it to be" U. S. ex rel. Cunningham vs. Mathues, 33 (2d) F. R. 261, on December 23rd, 1930, entered an order discharging the respondent (R. 107).

On the same date an appeal to the Circuit Court of Appeals (R. 109) was allowed and docketed as of March Term, 1931, No. 4543, with no further proceedings taken except the filing of the transcript of record.

On February 10th, 1931, a petition for certiorari was filed in this Court and its prayer granted on March 2nd, 1931.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

REMOVAL PROCEEDINGS—PROBABLE CAUSE—INDICTMENT PRIMA FACIE, NOT CONCLUSIVE—JURISDICTION OF REMANDING COURT—PERTINENCY.

(1)

On writ of habeas corpus in removal proceedings may the remanding court consider the indictment as prima facie but not conclusive evidence of the existence of a crime in its determination of probable cause, or has the court of trial exclusive jurisdiction to determine the existence of a crime.

(2)

Where all the proofs constituting the crime charged are contained in the indictment, may the prima facie evidence of probable cause established by the indictment be overcome by its own counts if without doubt they do not charge a crime.

(3)

Are the questions propounded, which respondent's refusal to answer constitutes the crime charged under Section 102 R. S. (U. S. C. Title 2, Sec. 192), "pertinent" to the investigation authorized by Senate Resolution 195 of the 69th Congress.

ARGUMENT.

Section 1014 of the Revised Statutes (U. S. C. Title 18, Sec. 591) makes the fact of probable cause of (1) the existence of a crime and (2) the guilt and (3) identity of the accused, the inquiry in removal proceedings.

The existence of a crime or the guilt of the accused prima facie may be established at the hearing of a petition for habeas corpus by introducing in evidence the indictment or by other proofs without the production of the indictment.

Distinction Between Indictment As A Pleading And As a Fact Evidential Of Probable Cause.

The distinction is clear between an indictment as a pleading in a criminal case and as a fact evidential of probable cause under a habeas corpus in removal proceedings.

The thread of differentiation announced by this court in Pierce vs. Creecy (1907), 210 U. S. 397, and repeated and applied in Rodman vs. Pothier (1923), 264 U. S. 399; Henry vs. Henkel (1914), 235 U. S. 219, and Morse vs.

United States (1924), 267 U. S. 83, and which runs through all the reported cases considered by either the District Courts or the Circuit Courts of Appeal of the United States is that in removal proceedings the court of asylum will not pass upon the sufficiency of the indictment as a formal pleading, but may consider the indictment as a fact with other facts in the proofs as evidential of the existence of a crime in its determination of the controlling inquiry of probable cause. The reason for this is evident, for unless the trial court is given plenary jurisdiction to determine the sufficiency of its pleadings, e. g. the indictment, the writ of habeas corpus could be made the substitute for a writ of error; and unless the remanding court may weigh the offense as charged in the indictment with all the other proofs, all the facts evidential of probable cause, or its lack, will not have been considered, and the most essential or persuasive consideration in reaching a conclusion will have been ignored, viz., *the existence of a crime.*

The Government's argument is based on the erroneous assumption that respondent attacks the sufficiency of the indictment as a pleading (pp. 7-13 Petitioner's brief).

In the instant proceedings the sufficiency of the indictment is not challenged as a formal pleading, but is attacked as a fact in the proofs evidential of the existence of a crime in the determination of the controlling inquiry of probable cause and this because its counts do not show the existence of a crime.

Petitioner's Error.

It is the confounding of the indictment as a formal pleading with its use of a fact in the proofs which leads petitioner to the erroneous contention that since the indictment sets forth the questions of disputed pertinency and alleges them to be "pertinent", the indictment is conclusive of probable cause and gives to the trial court exclusive and sole jurisdiction for the determination of that fact.

Conclusion of Circuit Court of Appeals.

The Circuit Court of Appeals, following the distinction as announced and repeatedly applied by this court held the indictment was not conclusive but prima facie evidence only of probable cause, concluded "that the prima facie evidence * * * which the indictment established is overcome by its own terms in failing to charge a crime" because the propounded questions are not pertinent, and ordered the discharge of the respondent.

It is then petitioner's contention that the remanding court is without jurisdiction to decide that no crime exists even though it is patent and without doubt that the indictment fails to disclose the existence of a crime, the accused must be held in custody and remanded to the trial court for judicial determination of this evident conclusion of law.

It is submitted that this is oppressive administration of criminal law without reason, which this court has always condemned. The contention (1) fails to observe the purpose of the hearing which Section 1014 of the U. S. Revised Statutes gives the accused and emasculates the statute since it says trial court must decide existence of crime though there is doubt neither as to statutory definition of crime nor acts alleged, (2) ignores the distinction between prima facie and conclusive use of the indictment as proof of probable cause, (3) disregards the necessity of finding probable cause, (4) ignores the existence of a crime as the most essential element in the finding of probable cause and (5) disregards the legal conclusions of this court that the question of pertinency is one of law and that the burden of proving pertinency is on petitioner.

Respondent's argument against petitioner's contention and in support of the conclusion and final order of the court below, may be stated and will be developed in the order following:

(1) The indictment is prima facie but not conclusive evidence of probable cause of either the existence of a crime or guilt of the accused.

(2) The indictment as prima facie evidence of probable cause may be overcome by its own terms because not charging a crime.

(3) The indictment does not charge a crime because the questions propounded as set forth in its counts are not "pertinent" to the investigation authorized by the Senate.

I.

THE INDICTMENT IS PRIMA FACIE BUT NOT CONCLUSIVE EVIDENCE OF PROBABLE CAUSE OF EITHER THE EXISTENCE OF A CRIME OR GUILT OF THE ACCUSED.

Few Circuit Courts of Appeal of the United States have so frequently and recently examined the law relating to probable cause in removal proceedings, as the three judges who decided this case.

In United States v. Glass (1928), 25 Fed. (2nd) 941, Judge Woolley writing the opinion of the Court, with the same members sitting, said:

> "The law on removal was correctly stated by the learned trial Judge and was recently reviewed by this Court in United States vs. Mathues, 19 Fed. (2d.) 22, and Swan v. United States, 23 Fed. (2d.) 148 with extended citation of supporting authorities."

He then stated that in the decision of that case he would "pursue the discussion solely on the law which we have before stated as follows:"

> "The indictment is introduced in proceedings under Section 1014, R. S. (18 USCA, Sec. 591), 'not to es-

tablish the appellant's guilt, but only as evidence to show that there was cause to believe his guilt probable enough to justify his removal for trial."

"The indictment is itself evidence that there was probable cause for finding it. Of this, however, the indictment is not conclusive * * * its evidential effect is only prima facie."

"Hence the accused may attack it as not charging a crime and therefore as not showing probable cause."

The above propositions were stated on the authority of Pierce v. Creecy (1907), 210 U. S. 387, and Morse v. United States (1924), 267 U. S. 81.

In Swan vs. United States (1928), 23 Fed. (2d.) 148, Judge Woolley points out the distinction above adverted to, in the language following:

"The requisite probable cause in removal cases may be proved by the indictment as evidence, or by other evidence without the production of the indictment, or, indeed, in advance of the indictment. * * * *When it is sought to be proved by the indictment, the instrument is prima facie evidence which may be overcome by its own terms when they fail to set forth a crime.* Yet no matter how inartificially it may be drafted, the Commissioner or Judge at a removal hearing has authority to pass upon its effect only in respect to its proof of probable cause. * * * He has no authority to determine the validity of the indictment when offered only as evidence. That is the function of the trial Court."

This Court in effect affirmed the distinction made by Judge Woolley in the above case when it refused to grant a petition of certiorari in Swan v. United States (1928), 277 U. S. 597.

In *Pierce v. Creecy, supra*, the distinction between the two methods of attack or uses of the indictment in removal proceedings, is said "though narrow, is clear," by Mr. Justice Moody, then speaking for this Court:

> "The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over reasonable challenge, to bring the accused to the bar for trial. *Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear.*"

He then points out that the one and primary inquiry is not the sufficiency of the indictment as a pleading, but, on the contrary, whether the acts set forth in the indictment charge a crime, saying:

> "Before proceeding further, it is well to set forth all the objections to the indictment made by counsel, in order to see whether, if any one of them is well founded, it shows that there was no charge of crime against the petitioner. For if all criticisms of the indictment should be approved, and they leave untouched in the pleading enough to show that the petitioner was charged with crime in the broad and practical sense in which those words ought to be understood, the condition prescribed by the Constitution has been performed."

After considering the separate exceptions, and pointing out that they all present "a mixed question of law and fact," he concludes that:

> "All the other objections are appropriate to a demurrer or a motion to quash or in arrest of judgment.

They are attacks upon the indictment as a criminal pleading."

The sentence following is particularly applicable to the instant case, for he finds that:

> "The indictment, whether good or bad, as a pleading, *unmistakably describes every element of the crime of false swearing.*"

In Morse vs. United States (1924), 267 U. S. 81, the essential facts are stated as follows:

> "Appellants, under indictment in the District of Columbia, while passing through New York on February 6, 1923, on their way to Washington for trial, were arrested and taken from the train by a United States Marshal upon bench warrants issued on Federal indictments found in New York, charging them with fraudulent uses of the mails. Previously, their removal to New York from Connecticut and Massachusetts, respectively, for trial under these indictments, had been sought under Sec. 1014, Rev. Stat. (Com. Stat., Sec. 1674, 2 Fed. Stat. Anno. 2d. ed., p. 654). The removal of Harry F. Morse from Connecticut had been granted by the Commissioner, but, upon *habeas corpus* proceedings, he had been discharged from custody by the Connecticut Federal District Court for want of probable cause, principally on the ground that the New York indictment was insufficient to charge a criminal offense (287 Fed. 907), although the New York court had previously held it good."

After a hearing at which the indictments were offered in evidence, together with other proofs, the writs were dismissed and Mr. Justice Sutherland states the second reason in support of error, in the following language:

"It is urged that the decision of the Federal District Court in Connecticut, discharging Harry F. Morse, was *res adjudicata* and conclusively determined (1) that the New York bench warrant was *illegally issued*, and, therefore, could not be made the basis for the subsequent arrest in New York; and (2) *that the indictment was fatally defective.*"

This Court's answer to the second contention makes clear the distinction, for the learned Justice points out that it

"Proceeds upon a complete misconception of the purpose for which the indictment is produced and considered in removal proceedings, and the authoritative effect of the ruling of the Commissioner and the Court on *habeas corpus* in receipt thereof. The inquiry in such proceedings is whether there is probable cause to believe the prisoner guilty and justify his removal for trial."

He then says:

"The indictment was before the Commissioner simply as evidence for the purpose of establishing or *tending to establish the commission of an offense;* and the Commissioner had authority to pass upon its effect *in that aspect only.*"

He then concludes that neither the Commissioner nor the Court *"had authority to determine the sufficiency of the indictment as a pleading,"* and quotes the following excerpt from Mr. Justice Moody, in *Pierce v. Creecy* (1907), supra:

"The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has

been, in fact, however inartificially, charged with crime in the State from which he has fled."

In short, in *Morse v. United States, supra,* it was contended (a) that the discharge of an accused in removal proceedings for want of probable cause, was conclusive of his guilt, and (b) that the indictment was insufficient as a criminal pleading, to sustain the charge of crime; and this Court denied both contentions, closing its opinion in the language following:

> "In other words, the Commissioner, or the Court, in review on *habeas corpus,* for lack of power cannot *conclusively adjudge the indictment, qua indictment, to be either good or bad, or pass finally upon the guilt or innocence of the accused."*

Henry v. Henkel (1914), 235 U. S. 219, does not modify either the law or practice as uniformly announced and applied by this Court. Mr. Justice Lamar, however, in the Henry case, emphasizes the fact that *where under all the proofs a doubt exists* as to whether the acts charged in the indictment or proved at the hearing disclose a crime, the removal Court should refuse the writ and remand the issue to the decision of the trial court.

The facts of *Henry v. Henkel* and of the instant case, are similar in so far as the indictment grew out of the refusal to answer questions before a legislative body. They differ, however in essential particulars. The Henry case suggested that the questions asked were neither relevant nor proper, and stressed the unconstitutionality of the Act which required the giving of information which was dishonorable for the witness to disclose. Counsel in that case urged that the unconstitutionality of the statute was so clear as to warrant the removal Court in so deciding as a matter of jurisdiction. This Court was of different opinion,

and *expressing doubt as to its constitutionality*, remanded the issue to the trial Court for final decision.

That case did not decide the issue raised in the instant petition, namely, should the removal Court decide as matter of law, that no crime is charged where the acts alleged in the indictment or proved at the hearing, clearly and without doubt, negative as matter both of fact and law, the existence of the crime charged.

Mr. Justice Lamar, on page 225, after referring to the fact that the scope of inquiry under the resolution of the House of Representatives was "the activities of national banks * * * and groups of financiers," says:

> "That the witness 'was asked to give the names of those composing the New York syndicate but claimed to have the right under the Constitution to decline to answer the question, saying, also, that he "did not want to disclose the names of the participants in the New York syndicate, although he understood it to be the wish of the subcommittee that he should, for the reason that he would consider it dishonorable to reveal the names of his customers unless compelled to do so." ' "

He then states, on page 227, that the defendant argued that, "in view of the provisions of the 4th Amendment to the Constitution, neither House can compel a citizen to disclose his private affairs as a basis for legislation."

> "They therefore contend that the papers show on their face that there was no jurisdiction to issue the warrant on which he was held, and that Henry should not be subjected to the hardship of being removed to the District of Columbia to stand trial upon an indictment which affirmatively shows that no crime has been committed."

He then discusses the law, and concludes that the facts of the Henry case are not within the rule announced in the cases relied upon by the petitioner, saying, on page 229:

> "Manifestly, this is true as to *disputed* questions of fact, and it is equally so as to *disputed* matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other *controverted* matters of law, and fact are for the determination of the trial Court."

He then reviews the cases in support of his conclusion, but is careful to add the principle, in language which is particularly applicable to the instant case, saying, on page 230:

> "The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute *making an offense of the acts charged.* In such case the committing Court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Greene v. Henkel, 193 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218."

In the succeeding sentence, he then sets forth the rule that a statute should, by the removal Court, be declared unconstitutional only "when plainly and palpably void."

It will then be observed that the Henry case recognizes the practice and announces the rule herein contended for by respondent, who suggests the only inquiry in this case is whether the proofs of the instant proceedings so clearly disclose that the acts charged in the indictment and proved at the trial, do not constitute any crime as to jus-

tify the removal Court in so deciding as matter of undisputed law or fact.

Benson v. Henkel (1904), 198 U. S., p. 11, is also an authority in accord wtih Pierce v. Creecy, supra, and Morse v. U. S., supra. After stating the general rule on page 10, "That the legal sufficiency of the indictment is only to be determined by the Court in which it is found," Mr. Justice Brown says:

> "Of course this rule has its limitations. If the indictment were a mere information, *or obviously, upon inspection, set forth no crime against the United States,* or a wholly different crime from that alleged as the basis for proceedings, or if such crime be charged to have been committed in another district from that to which the extradiction is sought, the Commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause."

On the necessity of the indictment setting forth such acts as will charge a crime, the learned Justice says:

> "While the principle laid down in some of the earlier cases in this Court, that an indictment upon a statute is ordinarily sufficient if framed in the language of the statutes has been somewhat qualified in later cases, the rule still holds good that where the statute contains every element of the offense, and an indictment is offered in evidence before the extradition Commission as proof of probable cause, it is sufficient if framed in the language of the statute with the ordinary averments of time and place, *and with such a description of the fraud, if that be the basis of the indictment, as will apprise an intelligent man of the nature of the accusation,* notwithstanding that such indictment may be open to motion to quash or

motion in arrest of judgment in the court in which it was originally found. An extradition Commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint upon which he acts *or the indictment offered in support thereof contains the necessary elements of the offense*, it is sufficient, although a more critical examination may show that the statute does not completely cover the case."

Rodman vs. Pothier (1923), 264 U. S. 399, does not question, but on the contrary distinctly announces the law as stated and applied by the Court below. The question involved in the Rodman-Pothier case was whether or not the prima facie of probable cause established by the indictment was overcome by the other facts introduced by the relator. This question depended on whether or not the alleged crime was within the exclusive jurisdiction of the United States, and this in turn on the question whether the United States had acquired title to the land embraced within a certain reservation. The District Court was of opinion that, p. 402:

"The defendant has failed to overcome the prima facie case made by the indictment and that the evidence fails to show the want of probable cause."

Mr. Justice McReynolds then points out, p. 402 that:

"The Circuit Court of Appeals (291 Fed. 311) was 'of the opinion that no other conclusion can be drawn from the evidence than that, at the time the crime charged in the indictment was committed, the United States had acquired no title in the land embraced within Camp Lewis Military Reservation.'

> * * * This being so there is an absolute want of probable cause for the removal of the appellant to answer to the crime charged."

He then gives this Court's conclusion to the contrary, because the principal question of exclusive jurisdiction and collateral question of title to the land involved "*consideration of many facts and seriously controverted questions of law,*" saying on page 402:

> "We think there was enough to show probable cause, and that the judgment of the district court is correct. Whether the locus of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law. As heretofore often pointed out, these matters must be determined by the court where the indictment was found."

At the bottom of page 402, the opinion closes with the statement: that it is because of the presence of disputed questions of facts and controverted matters of law, that these questions were remanded to the trial court.

> "Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court."

The following late case decided by the U. S. Circuit Court of Appeals for Second Circuit, is called to the attention of this Court as in accord with the law as by it announced and applied:

United States ex rel. Brody v. Hecht (1926), 11 Fed. Rep. 2nd Ser. 128, wherein the habeas corpus was sustained on the ground that the indictment and other facts in evidence not being in dispute clearly established that no crime was charged in the indictment.

Circuit Judge Rodgers tersely states the rule as follows, p. 134:

> "It must also be admitted that in removal proceeding, in which there are disputed questions of fact or disputed matters of law, such controverted matters of law or fact must be left for the determination of the court where the indictment was found, and cannot be decided by the court in which the removal proceeding is heard. * * * *It is, however, an entirely different matter where in such a proceeding there are no disputed questions of fact or of law, and it clearly appears that the offense charged in the indictment was not committed in the district in which the indictment was found.*"

II.

THE INDICTMENT AS PRIMA FACIE EVIDENCE OF PROBABLE CAUSE MAY BE OVERCOME BY ITS OWN TERMS BECAUSE NOT CHARGING A CRIME.

It was on the authority of Tinsley v. Treat (1906), 205 U. S. 20, that His Honor, Judge Woolley, reached the conclusion in U. S. ex rel. Haim v. Mathues (1927), 19 Fed. Reporter (2d) 22, that the accused may attack the indictment as not charging a crime, and in Swan v. United States, supra, that when probable cause "is sought to be proved by the indictment, the instrument is prima facie evidence which may be overcome by its own terms when they fail to set forth a crime."

In U. S. ex rel. Tassell vs. Mathues (1926), 11 Fed. R. (2nd), 53, Judge Davis says:

"If the indictment clearly fails to charge a crime, it is bad, and a defendant should not be removed to a district to answer the crime with which he has not been charged."

In *Tinsley v. Treat* (1906), 205 U. S. 20, in an opinion by Mr. Chief Justice Fuller, this Court said:

"It was held in Beavers v. Henkel, 194 U. S. 73; Benson v. Henkel, 198 U. S. 1; Hyde v. Shrime, 199 U. S. 62, as well as Greene v. Henkel, supra, that an indictment constituted prima facie evidence of probable cause, but not that it was conclusive.

We regard that question as specifically presented in the present case and we hold that the indictment cannot be treated as conclusive under Section 1014.

This being so, we are of opinion that the evidence offered should have been admitted. It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the District or Circuit Judge. Of course if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only prima facie, then evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that district could not be regarded as immaterial.

The Constitution provides that 'The trial of all crimes, except in cases of impeachment, shall be by jury and such trial shall be held in the State where the said crime shall have been committed' (Article III, Section 2); and that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed' (Amended VI); and in order that any one accused

shall not be deprived of this constitutional right, the Judge applied to to remove him from his domicile to a district in another State must find that there is probable cause for believing him to have committed the alleged offense and in such other district. And in doing this his decision does not determine the question of guilt any more than his view that the indictment is enough for the purpose of removal definitely determines its validity.

Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District Judge had thereupon determined that probable cause existed, and, such a determination could not be revised on habeas corpus, it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. Nor can the exclusion of the evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution.

This conclusion is fatal to the order and warrant of removal and requires a resersal of the judgment below and the discharge of appellant."

In Morse vs. United States, *supra*, Mr. Justice Sutherland stated that the indictment was before the commissioner as evidence only for the purpose of establishing or tending to establish the commission of a crime.

In *Pierce v. Crecy, supra*, Mr. Justice Moody points out that in that case,

"The only condition which it is insisted is absent is the charge of a crime. The only evidence of a charge of crime is the indictment, *and the contention to be examined is that the indictment is insufficient proof that a charge has been made.*"

He then points out the distinction between attacking the indictment as a criminal pleading, and as a fact in the proofs evidential of probable cause, saying that

> "Counsel conceded that they cannot successfully attack the indictment except by showing that it does not charge a crime."

In *Henry v. Henkel,* supra, Mr. Justice Lamar concedes the right of an accused to attack the indictment as not charging a crime, in the following language:

> "The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute *making an offense of the acts charged.* In such cases the committing Court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Green v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218."

Beavers v. Henkel (1903), 194 U. S. 76, cites the case *Green v. Henkel,* 183 U. S. 249, and recognizes the practice permitted both before the Commissioner and the removal Court on *habeas corpus* of the accused's rights to introduce evidence on the question of probable cause in rebuttal of the *prima facie* proof of the indictment.

In Greene v. Henkel (1901), 183 U. S. 261, the accused was permitted to attack the indictment as not charging a crime, but this court held on other evidence being introduced that probable cause was shown.

Every case referred to by petitioner with the exception of Hyde v. Shine (1904), 199 U. S. 62; Horner vs. United States (1891), 143 U. S. 570; and Hughes v. Gault (1925), 271 U. S. 142, herein has been analyzed; and it is submitted none of the cases sustain his contention, but are

authorities for the proposition that the remanding court may discharge the accused if the indictment does not charge a crime or all the evidence does not show probable cause that a crime exists.

Hyde vs. Shine, supra, is in accord with the law as stated by the Circuit Court of Appeals on the authority of Pierce vs. Creecy, supra; Rodman vs. Pothier, supra and Morse vs. United States, supra. Mr. Justice Brown on page 84 says:

> "In the Federal courts, however, it is well settled that upon habeas corpus the court will not weigh the evidence, *although if there is an entire lack of evidence to support the accusation the court may order his discharge.* In this case, however, the production of the indictment made at least a prima facie case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause."

The dissenting opinion by Mr. Justice Peckham concured in by Justices White and McKenna, says, page 86:

> "The indictment constitutes prima facie evidence of probable cause, but evidence may be given to rebut it."

The learned Justice further says on page 87:

> "The right is none the less, when the want of probable cause rests upon conclusive evidence of the absence of the defendants from the district at the time when the indictment alleges the conspiracy was formed in such district. If defendants were not then there, they could not be guilty of the crime charged in the indictment."

The dissenting opinion closes with the following sentence:

> *"The enforcement of the criminal law should not be made oppressive in such cases, and, therefore, when it appears there was no probable cause to found the indictment upon, the order of removal should be refused."*

In Horner vs. United States, supra, the accused was not arrested on a warrant after indictment found, but was arrested on complaint on oath of a post office inspector before a United States commissioner. On habeas corpus it was contended that the circular set forth in the complaint is not included in the prohibition of Sec. 3894 of the Revised Statutes (against lottery) and that the accused committed no offense by depositing the circular in the mail. The Circuit Court dismissed the petition and an appeal or writ of error was taken direct to this court under Section 5 of the Act of March 3, 1891, because the constitutionality of the Statute was drawn in question.

This court in an opinion by Mr. Justice Blatchford, on page 577, said:

> "But we are of opinion that that question ought not to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await the action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court on this appeal, nor was it proper for the Circuit Court, on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery."

In Hughes vs. Gault, supra, the indictment was held

sufficient and the accused remanded. Mr. Justice Holmes on page 151 says:

> "We do not regard the attack upon the indictment as needing discussion. It has been upheld by a number of district courts and by the circuit court of appeals for the sixth circuit as sufficient for removal purposes."

The question there presented was whether or not the refusal of the commissioner to admit evidence of innocence was deprivation of a *constitutional* in contradistinction to a *statutory* right under the constitution.

Mr. Justice Holmes after pointing out on page 149 that "the Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the court having jurisdiction of the charge," then points out

> "In Tinsley v. Treat, 205 U. S. 20, 33, 51 L. ed. 689, 695, 27 Supp. Ct. Rep. 430, the conclusion is not that the appellant by being denied the right to present any evidence was deprived of his rights under the Constitution, but that he was denied 'a right secured by statute under the constitution'."

It should be pointed out that in this case, Mr. Justice Brandeis in his dissent was of opinion that

> "by refusing to hear and to consider evidence introduced or offered which bore upon the existence of probable cause, the commissioner * * * deprived the petitioner of his liberty without due process of law in violation of the 5th Amendment, because he was denied a fair hearing."

Reference here should be made to Circuit Judge Woolley's conception of the law as stated by this court in

Hughes vs. Gault, supra. In United States vs. Mathues (1927), 19 Fed. Rep. (2nd) 23, after referring to this case "as the latest authoritative announcement on the subject," he says "The law of that case and of other cases there approved * * * is substantially as follows:

> "One accused of crime by indictment in a distant district, though liable to trial wherever indicted, cannot be arbitrarily and summarily removed from the district of his residence, but is entitled to a preliminary hearing. Such preliminary hearing is not a preliminary trial. It is had before a committing magistrate, who may be a judge, commissioner, mayor of a city, or justice of the peace, and it is only such as will bring out the probable cause of the charge and make certain the identity of the defendant. These are the two things that must be established before the accused can be lawfully removed. In such a hearing the function of the magistrate is not ministerial but is judicial in the limited sense indicated. He must pass on the question of identity—an issue purely of fact—and also on that of probable cause. The indictment is itself evidence that there was probable cause for finding it. Of this, however, the indictment is not conclusive. Tinsley v. Treat, 205 U. S. 20, 32, 27 S. Ct. 430, 51 L. Ed. 689; its evidential effect is only prima facie. Hence the accused may attack it as not charging a crime and therefore as not showing probable cause."

III.

THE QUESTIONS PROPOUNDED AS SET FORTH IN THE COUNTS OF THE INDICTMENT ARE NOT PERTINENT TO THE INVESTIGATION AUTHORIZED BY THE SENATE.

The ultimate contention of petitioner is that the pertinency of the questions propounded should have been left

to the determination of the trial court and this because the remanding court is without jurisdiction in the premises. This contention ignores the conclusions of this Court, (1) that the question of pertinency is one of law and not of fact and (2) the burden of proving pertinency is on the petitioner.

1. Question of Pertinency is of Law for the Court.

This court in *Sinclair vs. United States* (1928) 279 U. S. 263, in an opinion by Mr. Justice Butler, held in analogy to relevancy and materiality that the question of pertinency arising under Section 102 of the Revised Statutes was *of law for the court;* and what is particularly applicable to the instant case.

> 'That it would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

The Sinclair case did not decide, as the Government in its brief, pg. 19, would seem to suggest, that in removal proceedings the trial court must, and the court of asylum may not decide this question. No question of removal on habeas corpus proceedings arose. The question there was raised by counsel taking the position that the inquiry of pertinency was one of fact for the jury in contradistinction to one of law for the Court.

Mr. Justice Butler, on page 299, says:

> "The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under Sec. 102. The matter for determination in this case was whether the facts called for by the question, were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent

to the question under inquiry.' It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

2. Burden of Proof of Pertinency.

Sinclair vs. United States also settled another important and controverted question which arose at the first and second arguments of the instant case, and that is the party on whom rests the burden of showing the pertinency of the questions. His Honor Circuit Judge Buffington held in *United States vs. Barry* (1928) 29 Fed. (2nd) 817, that the burden rested on the Government, saying on page 821,

"But a ruling on the admissibility of evidence is not made on surmises. It is based on the ground that the burden of showing the relevancy of any testimony which is objected to is on him who proposes to give it."

Mr. Justice Butler in the Sinclair case held as matter of law that in criminal prosecution under Section 102 of the Revised Statutes the burden rests *"on the United States to plead and show that the questions pertained to some matter under investigation"*. He says on page 296:

"Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and

show that the question pertained to some matter under investigation."

It requires no demonstration that the remanding court *must* have jurisdiction to determine the question of probable cause in removal proceedings, if the indictment is not conclusive but only prima facie evidence of the existence of a crime and if the burden is on the Government to prove "pertinency" as the essential element of the crime charged in the indictment. Likewise, neither a question of fact can arise nor necessity exist for remanding the question of "pertinency" to the trial court, if the determination of this question is one of law and not of fact.

In the present case every act and word of the defendant which possibly could appertain to the crime charged in the indictment, are therein set forth. Those facts are free from all doubt or dispute, palpably are not "pertinent" and there is no question of statutory construction involved.

It is then obvious that the inquiry of probable cause, becomes a futile mockery, section 1014 of the Revised Statutes is ignored and an innocent man suffers the ignominy of false imprisonment; if the court of asylum may not decided as matter of law that no crime exists because of non-pertinency, but must hold in custody the accused and remand him to the trial court for its determination of the fact previously proved in the remanding court and of the law already established therein to its satisfaction.

Pertinency Not Decided in Barry vs. United States Ex Rel. Cunningham; But Distinction Made Between Judicial and Legislative Funtion.

This Court in an opinion by Mr. Justice Sutherland in Barry vs. United States ex rel. Cunningham (1928) 279 U. S. 597, in the paragraphs following, makes a dis-

tinction between the pertinency of questions when asked by the Senate at its bar and when asked by one of its committees; and explicitly refused to pass upon the pertinency of the instant questions which the committee propounded.

Page 612:

> "We must accept this unequivocal language (contained in respondent's answer 'to bring Cunningham to its bar * * * to answer * * * questions pertinent') as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial."

Page 619:

> "It is not necessary to determine whether the information sought was pertinent to the inquiry before the committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original and unqualified power conferred by the Constitution."

The importance of this distinction in the pending case lies in the differentiation between (a) the legislative and (b) judicial functions of the Senate, and particularly, in the express statement that the instant questions might become pertinent only if and when asked *by the Senate at its bar in performance of its judicial function of passing "upon the validity of Vare's election"*.

A. The Judicial Function.

The following deleted excerpts from the opinion of Mr. Justice Sutherland in the Barry case, supra, amplify the distinction and make clear the nature of the Senate's judicial function p. 613:

"Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. *Among these is the the power to judge of the elections, returns and qualifications of its own members.* * * * 'That power carried with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections', Reed v. County Commissioners, 277 U. S. 376, 388. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, * * * In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate. * * * *When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate.* * * *But the Senate* * * * *may* * * *dispense with* * * * a committee and itself take testimony * * * * * * and * * * may resume charge of the inquiry. * * * In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution."

The learned Justice then says, pg. 619:

"The Senate having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute."

He then points out that Cunningham "upon examination by the committee * * * repeatedly refused to answer questions which the committee deemed relevant and of great importance" and then says:

"These questions have already been recited and it is impossible for us to say that the information *"sought and refused would not reflect light upon the validity of Vare's election."*

It is evident then that this court, in support of its conclusion of the Senate's power to "bring Cunningham to its bar", suggested the possible pertinency of questions to be asked in the future by the Senate at its bar in exercise of its judicial function of passing upon the qualifications of Vare; but refused to pass upon the pertinency of the instant questions which relate alone to primaries and were asked by the Senate's committee under its limited authority in performance of its legislative function.

B. The Legislative Function.

The instant questions were asked by the committee in the performance of a legislative function, else why the distinction which Mr. Justice Sutherland makes; for if asked in exercise of the judicial function, their pertinency became material and required answer in the Barry case with the same force as if asked by the Senate when passing upon the qualifications of Vare as a member. The (a) reason for and (b) necessity of the distinction are as clear as the fact is conclusive that the committee when it

asked the questions, was not functioning as a judge of Vare's qualifications.

A. The reason for the Distinction.

The instant indictment alleges that the questions were asked on *February 21st, 1927*, during the second session of the 69th Congress, which ended March 4th, 1927, and Vare was elected as a member of the 70th Congress for the term of six years *"beginning on the 4th day of March 1927"*, as stated by the respective certificates of Governor Pinchot (page 51 R. U. S. Cir. Ct. of Appeals, U. S. vs. Barry) and Governor Fisher, page 5, Appellant's Paper Book U. S. Sup. Ct. Barry vs. U. S. ex rel. Cunningham and p. 13 U. S. Circuit Ct. of Appeals; and his qualifications as a member could be passed upon only after he had become a member and then only in and by the Congress of which he was a member.

In short, although the Senate is a continuing body, its power, either as a whole or through its committees, to judge of the qualifications of a member, is contemporaneous with the term of the member; it arises in the Congress when his term begins and ends with the expiration of his term; although the oath of membership is not administered and he is denied his seat, and *notice of the contest must be filed and evidence relative to the election may be taken.*

It cannot be concluded that the limited authority of the special committee to investigate the primaries for a legislative purpose was so enlarged by Resolution No. 324 as to give to it the Senate's unlimited judicial power of judging the qualifications of Vare, from the mere fact that Wilson filed notice of a contest and the Senate authorized the special committee "to take and preserve evidence in connection with the election of a senator from Pennsylvania on November 2nd, 1926."

The indictment explicitly charges that the authority of the Committee and the purpose of its investigation was to determine the necessit

The indictment explicitly charges that the authority of the Committee and the purpose of its investigation was to determine the necessity of additional legislation. There is no suggestion therein contained of either the authority or purpose of the Committee to judge Vare's qualifications.

The indictment (pages 14 and 15, Transcript of Record) avers that the --

> "said Committee was empowered and directed to investigate * * * the alleged fraudulent and corrupt and unlawful practices in connection with the nomination and election of candidates for the * * * Senate, * * * and to report its findings and recommendations to the Senate with a view to enabling the Senate to ascertain and determine what, if any, other or additional legislation might be advisable in the premises; * * * that the said Committee did * * * exercise that authority, * * * make such investigation for the purpose of making such report, findings and recommendations to the Senate, with a view to enabling the Senate and to ascertain and determine what, * * * additional legislation might be advisable, and * * * for that purpose * * * did hold * * * hearings at which witnesses were * * * produced."

No power is delegated by the Senate in its Resolution No. 324 (R. U. S. Cir. Ct. of Appeals, U. S. vs. Barry, pg. 45), in the second session of the 69th Congress *to judge of Vare's election*, because neither it nor its committee could judge in the 69th Congress the election of a member to the 70th Congress.

The Senate refrained from adopting any resolution until the first session of the 70th Congress, either to refer the contest between Wilson and Vare to any committee or to delegate to any committee power to judge of the election.

It was not until December 17th, 1927, that the Senate adopted its Resolution 68 (Transcript of Record, U. S. Circuit Court of Appeals, U. S. ex rel. Cunningham vs. Barry, pg. 53) with the following recital:

> "Whereas on the 4th day of March, 1927, the Senate referred to the Committee on Privileges and Elections, the pending contest between * * * Vare and * * * Wilson"; and conferred on that committee the authority to "hear and determine said contest, * * * to take * * * evidence * * * and to certify its conclusions to the Senate."

If there be any doubt that the special committee on February 21st, 1927, at the second session of the 69th Congress was without power to judge the qualifications of Vare, it should be dissolved by the following facts:

(1) The special committee made neither report nor recommendation at the opening of the first session of the 70th Congress on Vare's election; and (2) its Resolution No. 2 was adopted on December 9th, 1927, which declared that Vare's credentials were "tainted" and referred his "claim * * * to a seat in the * * * Senate to the special committee"; and (3) the indictment charges a legislative purpose.

(P. 15, Transcript.)

Admittedly the Senate by Resolution 2 and Resolution 68 adopted respectively December 9th and December 17th, 1927, conferred upon its standing Committee on Privileges and Elections and the special committee, the judicial function to judge of Vare's qualifications; *and a different question would arise if the instant questions had been propounded by either the special committee or the standing committee in the 70th Congress after the adoption of the Resolutions, instead of being asked at the second session of the 69th Congress before the adoption of either of said Resolutions.*

The following closing sentence of the opinion of this Court by Mr. Justice McReynolds in Newberry v. United States (1920), 256 U. S. 231, at pg. 258, would seem to indicate the propriety of such questions if asked in exercise of a judicial function:

> "As each 'House shall be the judge of the elections, qualifications and returns of its own members'. and as Congress may by law regulate the times, places, and manner of holding elections, the national government is not without power to protect itself against corruption, fraud, or other malign influences."

The dissenting opinion of Mr. Justice Pitney criticises this conclusion as follows, pg. 285:

> "In support of a narrow construction of the power of Congress to regulate 'the manner of election' of its membership, it is said there is a check against corruption and kindred evils affecting the nominating procedure, in the authority of each House to judge of the elections, returns, and qualification of its own members; the suggestion being that if—to take a clear case—it appeared that one chosen to the

Senate had secured his election through bribery and corruption at the nominating primary, he might be refused admittance. Obviously, this amounts to a concession that the primary and the definitive election, whose legal separateness is insisted upon, are essentially but parts of a single process; else how could the conduct of a candidate with reference to the primary have legitimate bearing upon the question of his election as Senator? But the suggestion involves a fundamental error of reasoning. The power to judge of the elections and qualifications of its members, inhering in each House by virtue of section 5, of Art. 1, is an important power essential in our system to the proper organization of an elective body of representatives. But it is a power to judge, to determine upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass an arbitrary edict of exclusion. *And I am unable to see how, in right reason, it can be held that one of the members of Congress, in the just exercise of its power, may exclude an elected member for securing by bribery his nomination at the primary, if the regulation by law of his conduct at the primary is beyond constitutional power of Congress itself.*"

(b) The necessity for the distinction arises from the two facts following:

(1) Every question asked by the committee in the 69th Congress on February 21st, 1927, relates to the Pennsylvania primaries or nomination of Vare, and not one question to his *election*.

(2) It was on March 22, 1928, in the 70th Congress that the Senate passed its resolution to bring "Cunning-

ham before the bar of the Senate" then and there to be interrogated.

It is the ignoring by the Government of the fact that neither the Senate nor its committee on the 21st day of February, 1927, in the 69th Congress had power to pass upon the qualifications of Vare as a member of the 70th Congress whose term began on the 4th day of March, 1927; and the further fact that every question asked related to the Pennsylvania primaries or nomination of Vare, and not to his election, and also the failure to observe the resultant distinction between the propounding of the questions by the committee in exercise of a legislative function within the limits of its delegated authority and their being asked by the Senate in performance of the judicial function of passing upon the qualifications of a member, that led the Government in its brief on re-argument in the court below, pgs. 2, 3, and 4 and in its brief filed in this Court, pgs. 8 and 17, to stress the following sentence in the Barry case:

> "It is impossible for us to say that the information sought and refused would not reflect light *upon the validity of Vare's election*";

And, on page 17 of its brief in this Court and more fully in its brief on pages 2, 3 and 4 of reargument in the court below to urge that the Barry case rules the instant case and to argue that,

> "If it was impossible for the Supreme Court to say in advance that the questions, charged in this indictment, were not pertinent to the inquiry before the Senate Committee, surely it is likewise impossible for the remanding court * * * to say in advance that under no circumstances could the questions be pertinent * * * The Government submits that the deliver-

ance by Mr. Justice Sutherland * * * cannot be viewed other than as an affirmance of the deliverance of the District Court in the present proceeding. (26 Fed. 2d 272) where Dickinson, J., said:

> 'The broad question of the propriety of a particular interrogatory, or the narrower one of the relevancy or pertinency of evidence to be elicited thereby, *is a question which cannot be ruled upon consideration of the naked question alone. It must have read into it all its environments, including the atmosphere of the trial, and the personality and demeanor of the witness. None but the trial court, or an appellate court upon a review of the whole trial, can make the called-for ruling.*' "

It is submitted that the Circuit Court of Appeals in its final opinion by Judge Buffington, wherein on reargument it adhered to its original conclusion, demonstrates the patent error of the above contention, clarifies the distinction made by Mr. Justice Sutherland and states the vital issue involved in this case, as follows: (pg. 51-52, R., U. S. Supreme Ct., Mathues vs. U. S. ex rel Cunningham.)

> "After the opinion of this Court was filed, the case of Barry v. Cunningham, 279 U. S. 597, was decided. Thereupon the Government, conceiving that our decision was at variance with the holdings of the Supreme Court in that case, moved a rehearing be had * * * We * * * confine the present opinion to a * * * statement of why we do not regard the Barry case as ruling the present one. The indictment in the present case * * * concerns solely what had already taken place before a Committee of the Senate.

When Cunningham refused to answer the questions propounded by that Committee, his crime * * * if such it be, was completed, and for that completed crime he was indicted. *As his entire acts were set forth in the indictment,* the Court, on the application for removal, was required to determine whether probable cause was shown. * * * we held the lack of probable cause * * * in that the inquiry made of Cunningham was not pertinent *because no power had been conferred by the Senate on this Committee to make such inquiry.*

On the other hand, the case of Barry vs. Cunningham, supra, as held by the Supreme Court, concerned what took place afterwards; namely the action of the Senate in attaching Cunningham and bringing him before it 'then and there or elsewhere * * * to answer such questions pertinent * * * as the Senate * * * may propound'. It will thus be seen that so far as questions to Cunningham are concerned the indictment in the present case concerned questions already asked and refused to be answered, while the Barry case concerned questions to be asked in the future * * *.

This question of the pertinency of those questions, which the Supreme Court thus stated it did not pass upon, is the very question which we did then pass upon and which we are now constrained to pass upon in the present case * * * we adhere to our previous opinion and do not * * * disregard the holdings of the Supreme Court."

3. Questions Not Pertinent.

The hinge inquiry in determining the pertinency of the instant questions does not then turn, as suggested by Judge Dickinson in his first opinion in the District Court below and as contended by the Government, on the "en-

vironments and atmosphere of the trial and the personality and demeanor of the witness"; but rather the pivotal inquiry is the power of the committee to ask the questions in exercise of its legislative function and within the limits of the authority delegated by the Senate. This is a matter of law for the remanding court and not of "atmosphere" of the trial court.

The considerations are decisive of that inquiry are (1) the scope of the committee's delegated authority and (2) the subject-matter of the questions propounded.

The questions set forth in the indictment were not "pertinent" for three reasons,

(a) Their subject-matter was not relevant to the inquiry authorized by the Senate;

(b) Related alone to the "Pennsylvania Primaries" and the Senate, being without constitutional authority to legislate respecting primary elections, lacked the power in performance of a legislative function to investigate them; and

(c) The Senate may not impeach the credibility of its own witness by irrelevant questions relating to his own personal affairs.

Before considering these reasons in the order of their statement, attention should be called to the three well-settled principles of law as stated by this Court.

1. That the indictment shall set forth every element or ingredient of the crime charged.

Mr. Justice Clifford in United States vs. Cook (1872), 17 Wall, 168, said at pg. 174:

> "With rare exceptions, offences consist of more than one ingredient, and in some cases of many, and

the rule is universal that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad and may be quashed on motion, or the judgment may be arrested, or reversed on error."

2. It is not sufficient to set forth the offense charged in the words of the statute, in the instant case "*pertinent*".

In United States vs. Carll (1881), 105 U. S. 611, Mr. Justice Gray, at pg. 612, says:

"In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

The reason for this principle of law is thus stated by Mr. Chief Justice Waite in United States vs. Cruikshank, (1875), 92 U. S. 542, as follows, pg. 557:

"These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every each and all and singular' the rights granted them by the Constitution, &c. There is no specification of any particular rights. The language is broad enough to cover all.

> The object of the indictment, is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

In Roberts vs. Riley (1885), 116 U. S. 80, this Court applied the above principle in removal proceedings. Mr. Justice Matthews states at pg. 95 that the *first* of the three considerations in removal proceedings is "that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled". He then states what is particularly applicable to the instant case, pg. 95:

> *"The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus."*

See also Blitz vs. United States (1893), 153 U. S. 312, at pg. 315.

3. In Sinclair vs. United States, supra, Mr. Justice Butler after quoting from McGrain vs. Daugherty (1926), 273 U. S. 135, says pg. 292, on the protection of the individual from arbitrary inquiry into his private affairs says:

"And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions are not pertinent to the matter under inquiry.

It has always been recognized in this country, and it is well to remember, that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

(a) *The relevancy of the questions makes necessary an inquiry as to the scope of the authority which the Senate delegated to its special committee and to the manner in which the questions by the respondent were met.*

Resolution 195 of the 69th Congress authorized the appointment of a Special Committee, defined the scope of its inquiry and granted to it powers incidental and necessary to the performance of its duties.

The limit of the authority of the special committee was in its language to "investigate what moneys * * * or things of value * * * have been promised, contributed, made or expended * * * by any person, firm, corporation or committee, organization to influence the nomination of any person as a candidate * * * for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926."

The resolution then instructs the Committee to "report the names of the persons, firms or corporations, etc.,

* * * that have made * * * such promises * * * or payments and the amount of them * * * together with all facts in relation thereto."

The funds of money raised, the names of the contributors and the amounts contributed together with the relevant facts to influence the nomination of any person as a candidate for the United States Senate at the general election to be held in November, 1926, constitute the subject-matter and embrace the scope of the Committee's authority.

The witness testified truthfully and concisely to his official position and the different business in which he was interested; to the facts (a) of two contributions, (b) the amount of each (c) the form in which made (d) to whom and (e) when the respective contributions were made; and specifically testified that (f) the contributions were his personal donation and (g) from his personal estate.

He refused to answer any question (a) touching upon his wealth or (b) the course or (c) the manner of its accumulation or (d) out of what part of his personal estate either contribution came, or (e) how long the part contributed had been his property.

The opinion of the Circuit Court of Appeals by Judge Buffington, (pg. 58 R. Sup. Ct. Barry vs. U. S. ex rel. Cunningham) sets forth the questions which respondent answered, as well as the questions bearing on the inquiry which he answered fully and also the questions which he did not answer because by him deemed not pertinent. The opinion then states the scope of the inquiry as follows, (pg. 68 R. Sup. Ct. Barry vs. U. S. ex rel. Cunningham).

"Turning, then, to the underlying question, was Cunningham in contempt in declining to answer the questions asked? The answer to that is, Were such

questions relevant to the inquiry the Committee was authorized to make? That inquiry, so far as here pertinent was 'to investigate what moneys * * * have been * * * contributed * * * by any person * * * to influence the nomination of any person as a candidate * * * for membership in the United States Senate at the General Election to be held in November, 1926.' Such being the items of inquiry, the resolution provided for a report thereof to the Senate by the Committee of such items, viz., 'said committee shall report the names of the person * * * that have made such * * * payments and the amounts by them severally contributed * * * including the methods of expenditure of said sum * * * together with all facts in relation thereof.' And that the matters so specified constituted the scope of the committee's inquiry was evidenced by the resolution providing for imposing the penalties of Revised Statute 102 upon a witness who 'having appeared refused to answer any question pertinent to the investigation heretofore authorized.''

The opinion then proceeds with careful analysis to point out that the respondent had given full testimony and complete answer on every possible element of the inquiry and that the questions propounded are not pertinent, saying, (pg. 68 R. Sup. Ct. Barry vs. U. S. ex rel. Cunningham).

"Turning to the inquiry heretofore specified as authorized, we note that Cunningham, as bearing on 'what moneys * * * have been contributed,' testified he had contributed fifty thousand dollars. As bearing on the question whether such money was contributed 'to influence the nomination of any person as a candidate for membership in the United States Sen-

ate', he testified that he paid the money to Thomas F. Watson, treasurer of a political organization which was supporting Vare for nomination for United States Senator and Beidleman for Governor; that while he favored and supported Vare as a candidate his whole object in giving the money was to assist Beidleman, and if Beidleman 'had not been on the ticket I would not have given it.' Touching the subject of investigation described as 'including the method of expenditure of said sums', Cunningham testified he did not know whether his contribution had been reported in Beidleman's campaign expenses, adding 'I instructed Mr. Watson what my thought was about it.' It will thus be seen that Cunningham answered the questions asked him on the subjects specified in the resolution and that his answers enabled the committee, so far as the inquiry concerned him to fulfill the specified duties of their appointment, viz: to 'report * * * payments and the amount by them severally contributed * * * including the method of expenditure of said sums.' Such being the case, we do not see that proof of how Cunningham came by the money he says he thus personally contributed, could affect the objects of investigation referred to by the Senate to the Committee."

It is evident that the counts of the indictment do not disclose the essential elements of the crime charged in that standing alone, none of the counts shows the pertinency of the questions propounded; but palpably and patently, are not within the scope of the committee's delegated authority.

(b) *The subject-matter of every question pertained to the Pennsylvania primaries, related to contributions to the fund raised for the purpose of nominating Vare, and not to the general election, and were asked in the exercise of a legislative function.*

It is then obvious that no question here arises as to the power of the committee under authority of the Senate's delegated authority to ask on February 21st, 1927, questions relating to the *election* of Vare; for the crime charged in the indictment does not appertain to such inquiry, but sets forth questions relating only to his *nomination.*

The inquiry here and now presented is whether or not the questions as to the Pennsylvania primaries which the committee actually asked and Cunningham refused to answer, were propounded in the exercise of a constitutional function.

On May 18th, 1926, the Pennsylvania primary was held; on May 19th, 1926, Senate Resolution 195 was passed which gave to the special committee authority to investigate that primary; and on July 22nd, 1926, Cunningham testified before the committee at Chicago. At this stage the special committee was empowered, in exercise of a legislative function, to inquire alone into the nomination of senators. The general election had not taken place and the scope of the inquiry necessarily was limited to the primaries at which Vare was nominated, for the purpose of enacting laws regulatory of primaries.

The general election was held November 2, 1926; on January 8th, 1927, Wilson filed *notice* of his contest and on January 11th, 1927, the Senate passed Resolution 324 which authorized the "select committee * * * to take and preserve evidence in connection with the election."

The election contest could not and was not referred to any committee of the Senate until March 4th, 1927, and

then to the standing committee on Privileges and Elections. On that date Vare presented his credentials and on December 9th, 1927, the Senate at the first session of the 70th Congress by resolution 2 referred the "tainted" claim of Vare to the special committee. On December 17th, 1927, Senate Resolution 68 was adopted which conferred on the committee on Privileges and Elections authority "to hear and determine the contest." (Wilson-Vare).

It has been demonstrated in the prior pages of this brief that the questions charged in the indictment were asked on February 21st, 1927, while the Senate and the special committee in the 69th Congress were exercising a legislative function (pages 36-37), and that no judicial function was conferred on any committee by the Senate until the 70th Congress by Senate Resolutions 2 and 68. (Pages 37-38.)

It is then submitted that the questions as set forth in the instant indictment were asked by the special committee when it was exercising a legislative and not a judicial function; and that since the questions related to the nomination of Vare at the primary, as to which under Newberry vs. United States, supra, there can be no valid legislation, that the special committee was without constitutional authority to ask them.

In this case Senator Newberry was convicted of violating the several Acts of Congress which may be designated as the "Corrupt Practices Acts." These statutes provided in substance that no candidate for Congressman or Senator shall contribute for his nomination and election an amount in excess of that allowed under the laws of his State, and in no event in excess of $10,000.00.

The indictment charged contributions in excess of the allowed sum for his nomination and election. The court below overruled a demurrer as to the unconstitutionality of the statutes.

This Court in an opinion by Mr. Justice McReynolds, held that the Acts were unconstitutional because as by him stated on page 258:

> "We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state, and infringe upon liberties reserved to the people."

This was based on the conclusion as expressed in the syllabus as follows:

> "The only source of power which Congress (prior to the adoption of the 17th Amendment) possessed over elections for Senators and Representatives was U. S. Const., Article 1, par. 4, which empowers Congress to regulate the manner of holding such election."

In the view of Justice McReynolds the construction of this clause of the Constitution, as by him expressed on page 247, is "the ultimate question for solution."

The learned Justice refers to the fact that all of the Acts of Congress were enacted prior to the 17th Amendment to the Constitution; but expresses the opinion that this Amendment (page 252):

> "as finally submitted and adopted * * * does not undertake to modify Article 1, Section 4, the source of Congressional power to regulate the times, places,

and manner of holding elections. That section remains 'intact and applicable both to the election of Representatives and Senators.' "

Mr. Chief Justice White and Mr. Justice Pitney wrote dissenting opinions, the latter concurred in by Justices Brandeis and Clark, wherein they conclude that Congress had the power to legislate as to primaries, since an essential part of the election.

Mr. Justice McKenna concurred in the opinion of the majority but "reserves the question of the power of Congress under the Amendment."

In Chandler vs. Neff, 1924, 298 Fed. 515-519, Texas passed a law excluding Negroes from the right to vote in primary elections. The question was whether this violated the Fourteenth and Fifteenth Amendments. It was held that it did not because Congress had no right under the Constitution to regulate a primary.

District Judge West says (page 519):

"Any reasonable test of party affiliation may be required by the Legislature. Many cases are cited in support of this principle. A reference to the Digests, Corpus Juris and Cyc. gives numbers of citations in support of the point. In direct line with these authorities is the case of Koy v. Schneider, 110 Texas, 369, 218 S. W. 479, 221, S. W. 880, also Waples v. Marrast, 108 Tex. 5 184 S. W. 180. L. R. A. 1917 A 253.

"The balancing of authorities and the weight of authority if in doubt is settled by the Supreme Court of the United States in Newberry vs. United States, 256 U. S. 232, 41 Sup. Ct. 469, 65 L. Ed. 913. It was there held that primary elections 'are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they

intend to offer and support for ultimate choice by all qualified electors'. It therefore may be considered as determined that the State of Texas was within its powers in providing its tests of qualification of Democratic electors, and in providing by its articles that Negroes were not permitted to vote in a democratic primary election it was within the due exercise of its police powers which were reserved to it."

In Nixon vs. Herndon (1926), 273 U. S. 536, this primary law was stricken down by this Court because it deprived Negroes of the equal protection of the laws.

In United States vs. Cameron, 1922, 282 Fed. 684, District Judge Van Flett says:

"We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state and infringe upon liberties reserved to the people."

The following excerpt from the opinion of Mr. Justice Clark, in the case of United States vs. Gradwell, 243 U. S. 476, in this connection should be given (page 487):

"The constitutional warrant under which regulations relating to congressional elections may be provided by Congress is in terms applicable to the 'times, places, and manner of holding elections (not nominating primaries) for Senators and Representatives.' Primary elections, such as it is claimed the

defendants corrupted, were not only unknown when the Constitution was adopted but they were equally unknown for many years after the law, now #19, was first enacted. They are a development of comparatively recent years, designed to take the place of the nominating caucus or convention, as these existed before the change, and even yet the new system must be considered in an experimental stage of development under a variety of state laws."

It is then evident that at the time of the passage of the Resolution 195 Congress was without power to enact legislation, regulatory of the nominations of Senators. It must then follow as a necessary conclusion that being without legislative power to enact such laws, the Senate was without power to investigate facts relating to *nominations* of Senators preparatory to and for the sole purpose of formulating such legislation.

It should be further called to the attention of the Court that both the Senate and House of Representatives prior to the passing of Resolution 195 have acquiesced in and directly recognized the Constitutional inhibition which the Newberry case places on their power to enact legislation either regulatory of or relating to NOMINATIONS for either branch of Congress.

While Senators may disagree with the law as announced in the Newberry case; yet no Act of Congress affecting nominations has been enacted since that decision and the only statute enacted subsequent to it, as by Mr. Justice McReynolds therein suggested "to protect * * * against corruption, fraud or other malign influences" in elections, is the statute approved February 28th, 1925, (43 Statutes at Large 1071).

This act provides for publicity of campaign contributions and in express terms relates to *elections* only in a contradistinction to nominations. An election as therein

defined does not include *"either a primary election or a Convention of a political party."*

It is then finally submitted that the Senate being without constitutional power to legislate relative to the nominations of Senators by primary election or convention, is without authority to empower a special committee to make investigations into the nominations for the purpose of such legislation.

(c) *The Senate may not impeach the credibility of its own witness by irrelevant questions relating to his own personal affairs.*

No effort is made in petitioner's argument to meet the burden which this Court in Sinclair vs. United States, supra, imposes upon him, to show the pertinency of the questions, other than to urge their pertinency to test credibility. Petitioner's brief page 16 says:

> "The questions * * * were designed to test the veracity of his (respondent's) testimony."
>
> "Apparently that court (Circuit Court of Appeals Below) failed to appreciate the necessity of testing the respondent's veracity."

With deference, this is arguing in a circle and ignores both the statutory definition of the crime for which respondent is indicted and an elementary rule of evidence. The sole inquiry in this case is *pertinency,* for the crime charged is refusal to answer questions "pertinent" to a certain inquiry.

It is submitted that the Government cannot predicate *"pertinency"* on *credibility* without changing the crime to refusal to answer questions "testing veracity", as well as violating the evidential rule that its own witness may not be contradicted by cross-examination that is not *relevant or material.*

It is true that while there is conflict, yet the weight of authority holds that the discretion of the court is the only limit imposed on the wide latitude permitted in impeaching through contradiction of an *adverse* witness by cross-examination on non-relevant and collateral matters; but the rule would seem universal that the veracity or credibility of one's *own witness* may be impeached through contradiction, only by a cross-examination which is *relevant and material to the issue.*

The Government's contention necessarily assumes that the questions, being asked for the purpose of testing veracity, were pertinent or relevant. The respondent is here indicted for refusal to answer "pertinent" not veracity testing questions, nor for perjury for false answers.

It is obvious that a question not pertinent or relevant, cannot become "pertinent" because it is intended to test veracity; and that it is the *subject-matter* of the question and not its *purpose* which determines its relevancy or pertinency.

It is then the ignoring of the essential of the crime and of the distinction between impeaching one's own witness by contradiction through cross-examining him as to the *relevant or pertinent facts* and *irrelevant* and *collateral matters,* which leads to the Government's erroneous contention (petitioner's brief, p. 16) that respondent should be exposed "to a most searching examination *as to the source of*" his contributions to Vare's *nomination,* "for the purpose of enabling the committee to determine whether he was telling the truth."

This distinction is stated by Dr. Wigmore in his treatise on Evidence, Vol. 2, Sec. 878, pg. 242, where in pointing out the difference between cross-examination and extrinsic evidence in testimonial impeachment, he says "two things must be kept in mind":

"1. The question of relevancy is not touched by

them * * * it prescribes that such and such evidence, *if relevant* is to come only from a specific source. Its relevancy is still open to question, e. g., in evidencing bad character * * * we are still confined to facts that are relevant for the purpose, and we may at any moment be told that a given fact about which we are cross-examining * * * is not relevant."

"2. Thus there is no virtue in the cross-examination as such with reference to the admissibility of the alleged fact. The notion is now that because we are cross-examining, therefore we may get admission for this or that fact; for the fact cannot go in if it is not relevant; but the notion is that because we are not using extrinsic testimony, the fact is relevant may go in.

It is important to observe this, because the ordinary discussion of the rule of thumb leads often to a notion (for which the judges indeed are not responsible) that cross-examination has some mysterious virtue of its own which imparts merits to facts otherwise worthless. A loose belief doubtless obtains in some minds that almost anything may go in on cross-examination (saving the discretion of the Court). Conceptions of this sort should be radically abandoned. *Cross-examination is no universal solvent for reducing everything to admissibility. The notion is not only unsound, but misleading.*"

In Section 1003, pg. 435, Vol. 2, the learned author gives the test of relevancy or collateralness, which is decisive against the Government's contention:

"The common term for designating the line of exclusion is 'collateral'; *no contradiction*, we are told, *shall be permitted on 'collateral' matters.*

> But this term furnished no real test * * * The test that is dictated by the principle above explained, and the only test in vogue that has the qualities of a true test—definiteness, concreteness, and ease of application—is that laid down in Attorney-General v. Hitchcock: *Could the fact, as to which error is predicated have been shown in evidence for any purpose independently of the contradiction?*"

He then points out in Vol. 2, section 1004, pg. 437, et seq., that facts are not "collateral" which are relevant to the issue or which are relevant to the discrediting of a witness; e. g., his moral character, bias, corruption, skill, intoxication, illness, opportunity to observe, recollection, narration or prior inconsistent statement.

"But", as stated by Greenleaf on Evidence Vol. 1, (Lewis's Edition) Sec. 449, pg. 737, "it is a well-settled rule that a witness *cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony.*"

Again in Sec. 455, pg. 747, Greenleaf says:

> "Where the question is not material to the issue, but is collateral and irrelevant, being asked under the license allowed in cross-examination, it stands on another ground. In general, as we have already seen, the rule is, that upon cross-examination to try the credit of a witness, only general questions can be put; *and he cannot be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness.*"

Cyclopedia of Law and Procedure, Vol. 40, pg. 2564 states the general rule as to cross-examining any witnesses, adverse or the cross-examiner's own as follows:

"On cross-examination it is permissible to ask a witness questions for the purpose of testing his reliability and affecting his credit, and for this purpose great latitude is allowed. * * * (pg. 2566) *A witness cannot under pretense of impeachment * * * be interrogated as to matters not relevant to his credit and which the cross-examining party has no right to bring out for other purposes; and a question on cross-examination tending to insinuate that the witness is testifying untruthfully is bad.* Neither should the door be thrown open so wide for impeaching evidence as to allow questions to be asked upon the pretense that the object is impeachment, when there is no reasonable ground to expect favorable answers or to be able to prove by direct evidence that the unfavorable ones are false, and the sole tendency, if not the purpose, is to create suspicion in the minds of the jury."

Cyclopedia of Law and Procedure, Vol. 40, pg. 2766, states the rule which is particularly applicable to the instant case relative to the limitations of contradicting one's own witness by cross-examination:

"A party has a right to contradict his own witness by independent evidence showing the facts to be different from those testified to by such witness, although the incidental effect of the introduction of such evidence is to materially discredit the witness; *but a party cannot contradict his own witness where the only effect of the contradiction is to impeach the witness and not to give any material evidence upon any issue in the case.*"

At page 2769, Cyc. Vol. 40, gives the rule as stated in the above excerpt from Wigmore.

Vol. 28, R. C. L., secs. 226-277 set forth the rules as above stated by Wigmore, Greenleaf and the Cyclopedia of Law and Procedure. Section 227 follows:

> "It is well settled that although a party may not impeach his own witness directly, he may show that the statements made by him are not in fact true, and thus incidentally discredit him. * * * *While a party may contradict his witness as to a fact material in the cause, although the effect of that proof may be to discredit him, he cannot adduce such a contradiction when it is only material as it bears upon the witness's credibility.*"

It is deemed unnecessary to cite cases in support of the foregoing rule of evidence. Its *only* exception, however, should be adverted to. A legal witness, i. e., one who must be called to prove a particular fact, e. g., a subscribing witness, may be impeached by cross-examination in the same manner and to the same extent as if he were an adverse witness. It cannot be suggested that Cunningham is within the exception.

It should be recalled that the Senate subpoenaed respondent as its witness to appear before its committee in its investigation of Vare's nomination; that he denied the power of the Senate or its committee to make such investigation for a legislative purpose; that he volunteered and gave information as to the amount and purpose of his individual contributions; and that he refused to answer the instant questions because (a) not within the power of the committee and (b) their personal nature. The following statement made by respondent's counsel at the hearing, should here be inserted (pg. 69 Tr. of Record):

> "Mr. Golder: I have advised Mr. Cunningham that, in my judgment, this committee has no juris-

diction to inquire into the primary election held in Pennsylvania; that it is only a local matter for the Commonwealth of Pennsylvania; and that in my professional judgment he can answer those questions which he sees fit dealing with the primary election, and that he may refuse to answer those questions which he considers his own personal business. I have further advised Mr. Cunningham that he need not disclose to this committee from what part of his personal estate, or personal fortune, he paid the money, to Mr. Watson that he did pay during this last campaign in Pennsylvania.

I thought I would state that as a matter of record so that I would not have to object each time a question is asked."

The Government does not suggest that the information by him voluntarily given before the committee makes competent the instant questions, but in this connection an illuminating statement by Wigmore should be called to the attention of this Court. After referring to the general rule of exclusion of collateral and immaterial matters, he gives the following reason for the rule that information volunteered on direct-examination does not render competent cross-examination upon immaterial matters:

Vol. 2, Sec. 1007, pg. 447: "Occasionally, before the theory had been completely worked out by the Courts, the argument of Unfair Surprise was treated as the only objection, and it was thought that where the *assertion* desired to be contradicted had been *made on the direct-examination*—i. e., had been 'volunteered' as the phrase went,—the witness had himself only to blame if he was not prepared to support every statement thus volunteered; in short, that all *asser-*

tions made on the direct-examination could be contradicted and shown erroneous, and that the same freedom applied to assertions *volunteered on the cross-examination;* upon which, it was thought, there could not be any unfair surprise. This form of the rule still crops up occasionally.

But this form of rule ignores the other co-operating reason for the rule, i. e., Confusion of issues. Even if one conceded that this form sufficiently obviates the reason of Unfair Surprise, the other reason would still remain, and would be equally fatal, even when the assertion on the collateral matter was made on the direct-examination. The following passage satisfactorily disposes of the error in question.

1859, R. W. Walker, J., in Blakey's Heirs v. Blakey's Executrix, 33 Ala. 619: 'In Dozier v. Joyce it seems to have been considered that the main reason for the rule which prevents a cross-examination upon immaterial matters for the mere purpose of contradicting the witness, is that he cannot be presumed to come prepared to defend himself on such collateral questions; and, as this reason fails when the testimony is voluntarily given, the rule itself does not in that case apply. The reason referred to is doubtless one of those on which the rule was founded, but it is not the only or even the chief one. The principal reasons of this rule are, undoubtedly, that but for its enforcement the issues in a cause would be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be perplexed and confused, and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial inves-

tigations would become almost interminable. An additional reason is found in the fact that, the evidence not being to points material in the case, witnesses guilty of false swearing could not be punished for perjury. These reasons apply equally whether the evidence on such collateral matters is brought out on the examination in chief or upon cross-examination, and whether the witness gives it voluntarily or in response to questions calling for it."

It is then submitted that the respondent having given to the committee voluntarily all the information within his knowledge and contemplated under the asserted authority of the Senate, should not be exposed on mere surmise or suspicion to a cross-examination for the purpose of testing his credibility. The presumption should be indulged that the Senate's witness in its own investigation is telling the truth, when in discharge of his duty as a citizen he gives all information essential to or within the scope of the legislative inquiry, and there is no known fact which impeaches the truth of his testimony which inherently is not improbable or untrue.

Fairness to the respondent requires that answer here should be made to the unjust and false inuendo contained in the following excerpt from petitioner's brief pg. 16:

> "He had been clerk of a State court for twenty-one years, and at the time of his examination was receiving a salary of only $8,000 per year, and yet he testifed that he contributed $50,000 in cash toward the expenses of a Senatorial campaign."

It should be recalled that the respondent testified not only that it was his money, but that he had not collected one dollar or received any money from any individual or source whatever, (pg. 74 Tr. of Record).

This Court is respectfully asked to take judicial notice of ~~that~~ fact that in the investigation now being conducted by the Senate of the State of Pennsylvania, Vice-President Myers of the Mitten Management of the Philadelphia Rapid Transit Company testified that *on January 22nd, 1926,* the Cunningham Cab Company, owned and operated for years by "Sheriff Thomas W. Cunningham and his son" was purchased by the Philadelphia Rapid Transit Company for the sum of $150,000.00, that "Sheriff Cunningham" received net approximately $100,000.00 and that the first payment was made on *January 22nd, 1926.* (Phila. Bulletin March 30-31, 1931.)

In the large, it is not suggested that the Senate must be bound by the testimony of a witness called before its committee nor that it is precluded from asking any question that may be pertinent or relevant to the legislative or judicial inquiry; but it is submitted that no question may be asked by the Senate or its committee in exercise of a legislative function as to which the Constitution prevents legislation.

It is finally submitted that questions even when pertinent and asked by either the Senate or its committee in exercise of either a judicial or legislative function as to which it may legislate will not be permitted, if and when unnecessarily they impinge upon the personal affairs of the witness.

In Sinclair vs. United States, supra, Mr. Justice Butler reviews the cases which emphasize the care with which this Court will safeguard the individual against unreasonable inquiries into his personal affairs. He says on page 292 referring to McGrain vs. Daugherty, 273 U. S. 135:

> "That case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for

the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions are not pertinent to the matter under inquiry.

It has always been recognized in this country and it is well to remember, that few, if any, of the rights of people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions.

In Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377, this court, speaking through Mr. Justice Miller, said (p. 190) 'We are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen'. And referring to the failure of the authorizing resolution there under consideration to state the purpose of the inquiry (p. 195): 'Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By "fruitless", we mean that it could result in no valid legislation on the subject to which the inquiry referred.'

In re Pacific R. Commission (Circuit Court, N. D. California) 12 Sawy. 559, 32 Fed. 241, Mr. Justice Field, announcing the opinion of the court, said (p. 250): 'Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than

the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.' And the learned Justice, referring to Kilbourn v. Thompson, supra, said (p. 253): 'This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee.' And see concurring opinion of Circuit Judge Sawyer, p. 259 at p. 263, and of District Judge Sabin, p. 268, at p. 269.

In Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, Mr. Justice Harlan, speaking for the court, said (p. 478) 'We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. * * * We said in Boyd v. United States, 116 U. S. 616, 630, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and it cannot be too often repeated, that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of his life.'

Harriman vs. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115, illustrates the unwillingness of this court to construe an act of Congress to authorize any examination of witnesses in respect of their personal affairs * * *

In Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 68 L. ed. 969, 32 A. L. R. 786, 44 Sup. Ct. Rep. 336, this court said (pp. 305, 306): 'Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission vs. Brimson) * * *, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. * * * It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.'"

SUMMARY.

Respondent denies petitioner's contention that the indictment is conclusive of probable cause, and that the trial court has exclusive jurisdiction to determine the existence of a crime. He submits that the indictment when offered in evidence as proof of probable cause may be attacked, if its counts do not charge a crime; and this because the existence of a crime is the most essential element in the determination of probable cause.

The burden is upon petitioner to show that the questions propounded pertained to some matter under investigation by the Senate committee; and the determination of the question of pertinency is one of law for the court of asylum and not of fact for the trial court.

The entire evidence of probable cause or its lack consists alone of the indictment and the transcript of the notes of testimony; and consequently, all and every fact relative

to the offense charged in the indictment are therein set forth, are in evidence in this case and are free from doubt or dispute.

It is clear that the respondent voluntarily gave to the committee all information that it was possible for him to give within the scope of its inquiry or that could aid it in any manner in the performance of its duties; that the questions were asked by the committee in exercise of a legislative in contradistinction to a judicial function; that the subject-matter of the questions related to the primaries in contradistinction to elections and as to which, under the Newberry case, there could be no valid legislation; that the questions were not "pertinent" within Section 102 of the Revised Statutes and cannot be made so in order to test credibility; and finally, that it is crystal clear the questions related to personal affairs of the most delicate nature, and properly regarded by all men as sacred.

In conclusion, it is submitted that the pivotal inquiry in this proceeding then is, whether the questions propounded are pertinent; and it is suggested that this is so free from doubt as to permit the remanding court to conclude, as stated by the Circuit Court of Appeals, that "the indictment's prima facie evidence of probable cause is overcome by its own terms in failing to charge a crime." The Circuit Court of Appeals should be affirmed in its entry of the order in this habeas corpus proceeding discharging respondent.

All of which is respectfully submitted.

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RUBY R. VALE,
Attorneys for Respondent.

APPENDIX "A".

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 3857. October Term, 1928.

UNITED STATES OF AMERICA EX REL.
THOMAS W. CUNNINGHAM,
Appellant,

v.

W. FRANK MATHUES, United States Marshal,
Appellee.

Appeal
~~Aapepal~~ from the District Court of the United States for the Eastern District of Pennsylvania.

(Filed June 13, 1930.)

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges.*

BUFFINGTON, *J.*

After the opinion of this Court was filed, the case of Barry v. Cunningham, 279 U. S. 597, was decided. Thereupon the Government, conceiving that our decision was at variance with the holdings of the Supreme Court in that case, moved a rehearing be had. The motion was granted and such rehearing was given. On due consideration the members of the Court adhere to their views already ex-

pressed in the opinion and the dissent heretofore filed. We therefore confine the present opinion to a brief statement of why we do not regard the Barry case as ruling the present one. The indictment in the present case in the Federal Court for the District of Columbia concerns solely what had already taken place before a Committee of the Senate. When Cunningham refused to answer the questions propounded by that Committee, his crime of contempt, if such it be, was complete and for that completed crime he was indicted. As his entire acts were set forth in the indictment, the Court, on the application for removal, was required to determine whether probable cause was shown. On that question we held the lack of probable cause was shown in that the inquiry made of Cunningham was not pertinent because no power had been conferred by the Senate on this Committee to make such inquiry.

On the other hand, the case of Barry v. Cunningham, *supra,* as held by the Supreme Court, concerned what took place afterwards, namely the action of the Senate in attaching Cunningham and bringing him before it "then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said Committee, or the President of the Senate, may propound," etc. It will thus be seen that so far as questions to Cunningham are concerned the indictment in the present case concerned questions already asked and refused to be answered, while the Barry case concerned questions to be asked in the future. In deciding the case before it, the Supreme Court explicitly stated what it did and what it did not decide, namely,

> "We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the

committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial.

"It results that the following are the sole questions here for determination: (1) whether the Senate was engaged in an inquiry which it had constitutional power to make; (2) if so, whether that body had power to bring Cunningham to its bar as a witness by means of a warrant of arrest; and (3) whether as a necessary prerequisite to the issue of such warrant of arrest a subpoena should first have been served and disobeyed."

This question of the pertinency of those questions, which the Supreme Court thus stated it did not pass upon, is the very question which we did then pass upon and which we are now constrained to pass upon in the present case. Adhering, as we have said, to the respective views heretofore held on that question, we adhere to our previous opinion and in doing so, we do not, in our view, disregard the holdings of the Supreme Court.

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Teste:

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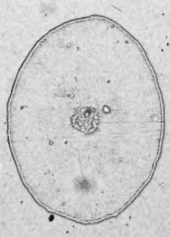
Clerk of the United States Circuit Court of Appeals for the Third Circuit.



SUPREME COURT OF THE UNITED STATES.

No. 720.—October Term, 1930.

Walter C. Fetters, United States Marshal for the Eastern District of Pennsylvania, Petitioner, *vs.* United States of America, *ex rel.* Thomas W. Cunningham.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 25, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

On April 20, 1928, an indictment was returned by a grand jury in the Supreme Court of the District of Columbia, charging the respondent Cunningham with a violation of § 102, R. S.* (U. S. C., Title, 2, § 192), in having refused to answer pertinent questions put to him by a committee of the United States Senate. It is not necessary to reproduce the indictment. For present purposes, the facts pleaded therein sufficiently appear in the opinion of this court in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597. After indictment, respondent was arrested in Pennsylvania upon a warrant issued under § 1014, R. S. (U. S. C., Title 18, § 591), and taken before a United States district judge sitting as a committing magistrate. Section 1014 provides:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magis-

*Sec. 102. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

trate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

That section further provides for the removal of the offender, if committed, to the district where the offense is to be tried.

At the hearing before the district judge the government, to show probable cause, introduced in evidence a certified copy of the indictment, and rested. Respondent challenged the sufficiency of the indictment upon the ground that the questions set forth therein, which he had refused to answer, were not pertinent to the committee's inquiry, and introduced a transcript of the proceedings before the committee. The district judge ordered respondent's commitment and his removal to the District of Columbia. Respondent, thereupon, sought his discharge from the custody of the United States Marshal, and filed a petition for a writ of *habeas corpus* to that end in the federal district court presided over by the same judge. That court held the indictment sufficient to support the commitment and removal and dismissed the petition. 26 F. (2d) 272. On appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was reversed on the ground that the indictment disclosed that the questions propounded to respondent were not pertinent to the inquiry, and, therefore, there was not probable cause for respondent's commitment and removal to another district for trial. 33 F. (2d) 261.

After our decision in the *Barry* case, *supra*, the court of appeals granted a rehearing, but, upon consideration, adhered to its former decision. Thereupon, the United States Marshal applied to this court for a writ of certiorari, which was granted, but with an order vacating the judgments of both lower courts and remanding the cause to the district court with directions to dismiss the proceeding as abated. *Mathues* v. *United States ex rel. Cunningham*, 282 U. S. —. This was done because the United States Marshal named in the petition had gone out of office and no substitution had been made within the statutory period. Respondent then surrendered himself to United States Marshal Fetters, who was then in office, and filed a new *habeas corpus* petition; and upon that petition, after a hearing, the district court ordered the respondent to be discharged, deeming itself bound by the opinion of the court of appeals upon

the former appeal. It is this last order which is now here for review, this court having granted a writ of certiorari pending the disposition of an appeal therefrom to the court below.

In proceedings under § 1014, R. S., the inquiry is limited to the question whether there is probable cause to believe the prisoner guilty, so as to justify his commitment and removal for trial. This inquiry may take place in advance of indictment or without the production of the indictment if one has been returned. When the indictment is produced before the committing magistrate it is received not as a pleading, but as evidence establishing or tending to establish the commission of an offense; and the magistrate has authority to pass upon it only in that aspect. He has no authority to determine its sufficiency as a pleading. *Morse* v. *United States*, 267 U. S. 80, 83, and cases cited.

Whether the indictment in this case properly could be held sufficient by the trial court upon demurrer, we have no occasion to consider. Without going into particulars, we think it clearly sufficient for removal purposes. The most that can be said is that the question whether the indictment is sufficient to put the respondent on trial is fairly debatable. It was never intended by § 1014 that an examining magistrate should have the power in removal proceedings to hold the facts pleaded in an indictment insufficient to charge an offense when that question is reasonably open to a difference of opinion. Doubtful questions of law relating to the sufficiency of the indictment or the validity of the statute upon which the indictment is based, as well as all doubtful questions of fact, are matters to be left for the trial court to determine. *Parker* v. *United States*, 3 F. (2d) 903, 904, and cases cited.

In *Hughes* v. *Gault*, 271 U. S. 142, this court, after pointing out that the proceedings under § 1014, R. S., were intrusted not only to judges and commissioners of the United States and judges of state courts, but to any "mayor of a city, justice of the peace, or other magistrate, of any State where [the accused] may be found," said (p. 150):

"Obviously, in order to make it the duty of the judge to issue the warrant a mayor or a magistrate not a lawyer cannot be expected to do more than to decide in a summary way that the indictment is intended to charge an offense against the laws of the United States, that the person before him is the person charged

and that there is probable cause to believe him guilty, without the magistrate's being held to more than avoiding palpable injustice."

A rule in respect of the power of one of the magistrates named in the statute, of course, applies to all.

And see *Rodman* v. *Pothier*, 264 U. S. 399, 402; *Henry* v. *Henkel*, 235 U. S. 219, 229.

The first order of commitment and removal made by the district judge was proper and should have been sustained. In the trial court the accused will have every opportunity to test the sufficiency of the indictment, since there it is not evidence, but "the very foundation of the charge." *Benson* v. *Henkel*, 198 U. S. 1, 12.

The judgment of the district court must be reversed and the cause remanded to that court for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.